



THE END OF THE ROPE:

**The Criminal Law's Perspective Regarding Acts of
Consensual Sexual Violence Between Adult Partners within
the South African, English and Canadian Legal Frameworks**

BY

VISHAY KUMAR SONI

(214543149)

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Supervisor: Ms Suhayfa Bhamjee

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DECLARATION

I, Vishay Kumar Soni, hereby declare that the work contained within this dissertation is that of my own, except where such is indicated in the content itself, and that this work has not been submitted in full or partial completion of the academic requirements of any other degree at any other university or institute.

I declare further that this dissertation was undertaken in the School of Law, under the College of Law and Management Studies at the University of KwaZulu-Natal in Pietermaritzburg, under the supervision of Ms Suhayfa Bhamjee.

Signed and dated at Pietermaritzburg on the 24 November 2018

Signature VK Soni

DEDICATION

This dissertation is dedicated to my father, Dr Sanjay Soni. Thank you for teaching me that the pen is truly mightier than the sword. I know that I have made you proud.

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I would like to thank my supervisor, Ms Suhayfa Bhamjee, for her herculean efforts, unwavering support and invaluable guidance throughout my academic career at the Faculty of Law at the University of Kwa-Zulu Natal. Thank you for always believing in me.

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To my brother, Vimal, thank you for listening to my often never-ending conversations about legality and jurisprudence. Thank you for enduring the loud sounds of my guitar during my writing breaks.

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ABSTRACT

Nestled within the Constitution lies a guarantee for the sanctity and enforcement of sections 10, being the right to human dignity, 11, promising the right to life and 12, protecting the freedom and security of the person.¹ On the converse, the acts of consensual sexual violence between adult partners, from the practices of sadomasochism and BDSM, question the very essence of these protected Constitutional rights.

South African criminal courts have not yet heard a matter concerning a dispute arising from consensual sexual violence. However, such may not be completely obscured within the vast discord of legality. The complexity and lingering shroud of legal ambivalence over this practice raises the question of whether South African courts will deem such activity as inherently criminal, based on existing legislation; along with the similarities in both national and international case law. Will a court find its definition within the common law crime of assault, or pay homage to the aforementioned Constitutional rights and rule in favour of the rights to privacy, dignity and freedom of expression? A court may also draw inspiration from the assessment of public policy, public interest and the often-illusory judicial perspective of victimless crimes.

This dissertation analyses the development of relevant criminal cases within the jurisdictions of England and Canada involving consensual sexual violence, bringing varying degrees of bodily harm, and its displacement within those legal systems. The dissertation interprets and compares such developments by the implementation of a cross-jurisdictional timeline regarding cases of consensual sexual violence and similar acts. Such leads to the juxtaposition within South African criminal jurisprudence, paying homage to the relevant Constitutional rights guaranteed to every citizen within South Africa.

The dissertation delves into the assessment and interpretation of relevant South African viewpoints regarding legal aspects such as consent, public policy, autonomy, dignity, sexuality, and elements of assault. This inquiry determines whether there is a duty upon the State to intervene and control such practices of consensual sexual violence in the democratic society,

¹ Sections 10, 11 and 12 of the Constitution of the Republic of South Africa.

or whether there is any respite for the State within the private confines of consensual adult interactions.

Ultimately, this dissertation analyses the possible legality of consensual sexual violence arising in varying degrees of bodily harm between consenting adult partners within South Africa. This is explored through perspectives of English and Canadian law by implementing a cross-jurisdictional timeline, in juxtaposition to the South African Constitutional prerogatives. Such a comparative inquiry leads to the possible position of the South African law in dealing with acts of consensual sexual violence and the interpretation of harm that emanates from these practices.

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CHAPTER 1: INTRODUCTION

1.1 Background to the Research Problem

As unexplored as is the legality of consensual sexual violence within the legal system of South Africa, a prelude regarding the element of consent is essential. Consent in this setting stretches beyond the mere peripheral definition, and into the realm of informed consent between consenting adults.

South African criminal law jurisprudence has faced instances where consensual bodily harm has manifested itself within various sectors of our society. This is prevalent in sports such as rugby and boxing where the consent to the infliction of bodily harm is acquired through the mutual consent of the participants.² Furthermore, the relevant sporting authority, and the State itself, sanction these particular activities as lawful practices. The recipient to such harm accepts the reasonable apprehension of the nature and risk of such a sport, bolstered by the common law *volenti non fit iniuria* principle.³ Even though prevalent in the law of delict, the *volenti non fit iniuria* principle dictates that willing consent to bodily harm; and its possible materialisation, is insufficient for a successful claim, or measure of prosecution, against an alleged wrongdoer.

Even though the *volenti* principle is far more prevalent in the law of delict than it is in criminal law, its extension in the criminal law's inquiry is prevalent to the element of consent. The focus of the *volenti* principle is the appreciation of the risk of the practice and the willingness to receiving such bodily harm by the 'victim'. This principle serves as a candid entry point for the criminal law where possible consensual sexual violence bringing bodily harm arises in South Africa. As was noted in the case of *Coetzee v Steenkamp*:

*"Volenti non fit iniuria or voluntary assumption of risk or that which is done with consent, within legal limits, is not wrongful or injurious."*⁴

² R. Ahmed "Contributory Intent as a Defence Limiting or Excluding Delictual Liability" (Masters Thesis, University of South Africa, 2011), 23.

³ Ibid.

⁴ *Coetzee v Steenkamp* (579/2009) [2010] ZANHC 25.

Consent to bodily harm proves to be pivotal in the inquiry within this dissertation. It should be noted that an individual is free to consent to bodily injury within South African law, as long as such an injury is not of a serious nature, resulting in actual, or grievous, bodily harm. In inspiration of the findings from the English case of *R v Donovan*,⁵ it was held that the nature of actual bodily harm is not transient or trifling, for such is any hurt or injury inherently calculated to interfere with the wellbeing of the consenting party.

Consent to varying degrees of bodily harm by autonomous, adult individuals encompasses multiple considerations of freedom and dignity, along with the looming allure of public policy, in guiding the broad societal acceptance of the harm caused. This dissertation's discourse into the criminal law's assessment of consent to bodily harm will follow the principles of valid consent and the accepted ambit of this defence to the practised harm. The element of intention within the specific crime of assault is also noteworthy if the State would seek to prosecute the specific harm emanating from consensual sexual violence.⁶

The right to freedom and security of the person is guaranteed within section 12 of the Constitution.⁷ The importance of the Constitutional right to bodily safety, security, and integrity assumes a paramount consideration within the background of this dissertation. This is attributed to the potential outlining of constitutional rights which consensual sexual violence may infringe. As it would appear, the Constitutional viewpoint serves as the forerunner in the necessity for the State to protect this fundamental right from being infringed by consensual activities that bring violence and bodily harm.⁸

The State is tasked with a two-fold inquiry in controlling the potential harm emanating from consensual sexual violence. Firstly, the State must determine whether it is necessary to effect a criminal prosecution over the practice, based on the intensity of the harm and its potential risk to others. Secondly, the State may seek to control the extent of the harm from the practice by implementing section 36 of the Constitution ('The Limitations Clause') to limit the various autonomy rights of the participants.⁹ If the State chooses the latter, the justification of the limitation of the specific rights must be substantiated by a broad legal inquiry.

⁵ *R v Donovan* [1934] 2 KB 498.

⁶ J.M. Burchell *Principles of Criminal Law* 4 ed. (2013) 577.

⁷ Section 12 of the Constitution of the Republic of South Africa.

⁸ *Ibid.*

⁹ Section 36 of the Constitution.

The aspect of consent to bodily harm delves into vast networks of correlating viewpoints from different jurisdictions. This dissertation shall draw primarily from the views of the relevant English and Canadian law principles regarding this consideration. It must be noted that a consensual, transient injury is of no concern to the law, for the harm caused is not of a severe magnitude to warrant a prosecution.¹⁰ However, consent to actual, or serious bodily harm may transcend societal interests and morals and may compel the State to act in protecting the rights of, *inter alia*, bodily safety, security, and dignity. The immensity of the harm emanating from the consensual act may be sufficient for the State to prosecute an individual whose actions have fallen within the definition of a crime. However, whether this stance will correlate to the reasonable limitation of personality rights treads upon a tightrope of uncertainty as consensual sadomasochism is unexplored in terms of South African law.

Marcus Tullius Cicero stated that '*We are in bondage to the law [in order] that we may be free.*¹¹' This remains a relevant social and legal viewpoint, for as citizens of the State, we are bound by the regulations of imposed law, and in turn, emancipated in the face of any injustice regarding our protected rights. In light of contemporary experimentation within our society, the nascence of consensual sexual violence should also be highlighted as a potential legal inquest within South Africa. Entwined within this viewpoint is the obligation of the State to prosecute an individual whose actions fall within the definition of a crime. In the absence of a specific statutory definition of an offence that brings a certain degree of harm upon the interests of the State or the rights of the people, a definitive application of the existing law should be conducted. The allotment of consensual sexual violence with the aforementioned perspective appears to push these legal boundaries within South African law and the potential approach of a court when interpreting such activities.

The legality of consensual sexual violence remains unexplored in the South African legal sphere and unidentified by any statutory aid or mechanism. The acts of sadomasochism and BDSM (Bondage, Discipline/Domination, Sadism, and Masochism) delve into the vast network of consensual sexual violence, coupled with a multitude of other legal avenues, such as autonomy and human rights. The act of sadomasochism involves two or more consenting adults; aware of, and accepting, the reasonable apprehension of receiving and/or delivering

¹⁰ *R v Donovan* [1934] 2 KB 498.

¹¹ C. Hanna 'Sex Is not a sport: Consent and violence in criminal law' (2011) 42 *Boston College Law Review* 239.

physical harm unto each other¹² in order to achieve sexual gratification. The practice is not limited to the aforementioned submission and the extent of sadomasochism varies considerably between partners.

This 'grey area' in the current South African law paves the way for the possible reasons as to why the State would seek to prosecute acts of consensual sexual violence, inspired by the views of the public interest and the desire to keep the public safe from risky and dangerous practices. A highly dangerous physical practice shall never sustain consent to serious bodily harm, as expressed in the precursor case of *S v Sikunyana*.¹³ However, much has changed in South Africa since the aforementioned case was heard and the development of public policy shines on in a flowering progression within the legal system. The advent of the Constitution and the entrenchment of democracy, along with ever-evolving public policy considerations, prove that stagnancy of an initial ideal in the South African legal system is highly unlikely.

Adhering to the concept of safeguarding the public health and well-being of the people, the concept of human dignity is cast into light regarding the practices of consensual sadomasochism and BDSM. Section 10 of the Constitution dictates,¹⁴

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

The promise of human dignity must be explored in juxtaposition to the practices of consensual sexual violence. Both the general idea of human dignity, which is applied unanimously to the public; and the subjective ideal of dignity regarding the participants to the sexual practice must be established. Within the concept of human dignity, it should be mentioned that individuals are capable of self-determination, along with the intrinsic manifestation of personal autonomy.

Section 11 of the Constitution, guaranteeing the absolute right to life of an individual is relevant, for the extent and intensity of the sexual violence may very well infringe this right, based on the degree of the consensual harm.¹⁵ Furthermore, section 12 of the Constitution is instrumental in assessing the freedoms and security of every individual within South Africa.¹⁶ This section appears to stand at loggerhead with acts of consensual sexual violence, for the practice outlines potential violence and degrees of torture, emanating in varied forms of assault.

¹² J.T. Harviainen 'Sadomasochist role-playing as liveaction role-playing: A trait-descriptive analysis' (2011) 2 *International Journal of Role-Playing* 60.

¹³ *S v Sikunyana* 1961 (3) SA 549 (E).

¹⁴ Section 10 of the Constitution of the Republic of South Africa.

¹⁵ Section 11 of the Constitution.

¹⁶ Section 12 of the Constitution.

Furthermore, these practices of bodily harm appear to contradict section 12, as there is a physical threat to one's body, and a psychological desire to inflict such a harm.¹⁷

Without being benighted by the viewpoint of what the public interest views as safe and lawful, the notion of sexual gratification becomes pertinent within this inquiry. The act of sadomasochism, at its root, is to express sexual gratification between the giver and the receiver.¹⁸ Sadomasochism is not only steeped within acquiring consent to sexual intercourse, but also to the acquisition of consent to the specific form of sexual violence.

In a democracy such as South Africa, a reasonable intervention by the State in prosecuting an act of consensual sexual violence would be juxtaposed to the notion of freedom of expression,¹⁹ tied to human morality and dignity. In a constitutionally protected sphere, morality and dignity stand as a paragon human benchmark of protection by the State. Human dignity, under section 10 of the Constitution,²⁰ is a pivotal concept that should be interpreted individualistically, based on its inherency for every person and the potential outlining of the subjective nature of consensual sexual violence.

However, in stark contrast to the State's prerogative to prosecute acts of consensual sexual violence between adults, the viewpoint of victimless crimes becomes prevalent. The emerging modern society is entwined with social facets that did not exist in years past. Furthermore, the influx of sadomasochistic material in the media is noteworthy. From fictional literary works, such as the international bestseller *Fifty Shades of Grey*,²¹ to modern films and the pornographic industry; sadomasochistic material has seeped its way into the very fabric of the public sphere and has garnered a level of intrigue, experimentation, and investigation throughout.

Individuals engaging in practices such as consensual sadomasochism may desire hazardous actions inflicted upon them. Such was apparent in the English case of *R v Brown*,²² known colloquially as 'Operation Spanner'. A focus of this dissertation seeks to shed light on whether there is an inherent need for the State to prosecute victimless crimes, where both consenting parties engage in 'prohibited' acts. It should be noted that the victim feels no need to lay a charge against the perpetrator, based on the personal belief that such a victim has experienced

¹⁷ Section 12(2)(b) of the Constitution.

¹⁸ R. McNulty *Sex and Sexuality/ 3 Sexual Deviation and Sexual Offences* vol. 3 (2006) 22.

¹⁹ Section 16 of the Constitution of the Republic of South Africa.

²⁰ Section 10 of the Constitution.

²¹ E. James *Fifty Shades of Grey* (2012).

²² *R v Brown* [1994] 1 AC 212.

no true harm or injury from the practice.²³ The individual is a ‘victim’ because it is the law that labels them as such.

R v Brown shall be juxtaposed to the development of relevant legal viewpoints from both English and Canadian law,²⁴ elaborating on the extension of legal issues in *Laskey, Jaggard and Brown v the United Kingdom* in the European Court of Human Rights.²⁵ The cases of *R v Welch*,²⁶ and *R v Lock*,²⁷ are but a few of the cases that will be explored within this dissertation; whilst assessing other, splinter-like, cases related to the interpretation of consensual harm.

The possibilities of consensual sexual violence arising as a victimless crime, as both participants have the necessary intention to receive and/or inflict bodily harm, proves essential to decipher. Even though the acts of violence are consensual between the adults, the integral question of whether the State may prosecute such a victimless crime may derive itself from a multitude of factors. This is encumbered upon the rights of individuals within the democracy of South Africa, focussing on constitutionally protected rights and the doctrine of public policy regarding the broad exposure of such an act. In addition, the notion of autonomy and its displacement within consensual adult interactions is drawn into the fold of investigation.

1.2 Statement of the Problem Question and Correlating Inquiries

The focal question that this dissertation shall seek to answer is in consideration of the overall harm caused within a consensual sadomasochistic relationship. When will the State be justified in prosecuting consensual sadomasochism that brings varied degrees of bodily harm? This digs deep into the notion of whether such an act, between consenting adults, is inherently unlawful in its nature, or is only rendered unlawful at a defined threshold of bodily harm.

Thus, an investigation of this dissertation seeks to uncover whether the practice of consensual sadomasochism falls within a valid entry point for prosecution by the South African Criminal law. If such a realisation of prosecution exists, the secondary investigation will consider the appropriate manner to prosecute such an action. Accessory to this problem question is whether

²³ Sections 20 and 47 of the Offences against the Person Act 1861 of the United Kingdom.

²⁴ *R v Brown* [1994] 1 AC 212.

²⁵ *Laskey, Jaggard and Brown v United Kingdom* 1997 (Application No. 21627/93; 21628/93; 21974/93) ECHR 4.

²⁶ *R v Welch* (1995) 25 OR (3d) 665.

²⁷ *R v Lock* at Ipswich Crown Court (Judgement on 22nd January 2013)

the inquisition of the State into the nature of the practice will unjustifiably infringe the personality rights of human dignity,²⁸ privacy,²⁹ and the freedom of expression of the participants.³⁰ Therefore, if the State sees it fit to prosecute consensual sexual violence, will such a prosecution be justified in the limitation of the aforementioned personality rights?

1.3 Aims and Objectives of the Research Dissertation

The primary objective of the research is to determine the legality of consensual sadomasochism practised between consenting adults. Secondly, the aim is to consider a definitive bracket of State-interpretation regarding the harm from the practice. Accessory to these aims, the objective of juxtaposing consensual sadomasochism to legal avenues such as public policy, public interest, considerations of autonomy rights, and a reflection upon victimless crimes takes flight.

1.4 The Significance of the Research Dissertation

Consensual sexual violence is emerging in greater volumes within societies of the world and developing into far more than just an underground ‘deviant’ sexual act.³¹ This dissertation seeks to elaborate on whether consensual sexual violence should be prosecuted by the South African Criminal law, or permitted under an accepted nature and defined setting.

There is a dearth of legal literature encompassing the validity of consensual sadomasochism resulting in varying degrees of harm within South African criminal law jurisprudence. The significance of this dissertation will seek to decipher the potential position of the criminal law regarding its interpretation of consensual sadomasochism. This, in turn, attempts to yield a clearer transition of the application of the criminal law in a holistic interpretation of other legal

²⁸ Section 10 of the Constitution of the Republic of South Africa.

²⁹ Section 14 of the Constitution.

³⁰ Section 16 of the Constitution.

³¹ T. Bezreh, T.S. Weinberg, and T. Edgar ‘BDSM disclosure and stigma management: Identifying opportunities for sex education’ (2012) 7 *American Journal of Sexuality Education* 38, 39.

considerations. This will be in reflection of the specific constitutionally protected rights of the consenting individuals to the practice.

1.5 Limitations of the Research

The research shall only consult the international legal strides from the developments of the relevant legal positions within England and Canada respectively. The reason for choosing these jurisdictions derives from the numerous consensual sexual violence matters that have found themselves before courts of the aforesaid countries. As will be explored in Chapter 2 of this dissertation, these countries have interpreted principles of consent to the commission of bodily harm and propose a developing judicial outlook on the act of consensual sadomasochism. Furthermore, these countries allow for a broad interpretation of different forms of consensual sadomasochism which has evolved over the years. In turn, the courts of the aforesaid jurisdictions have attempted to develop their initial outlook on consensual harm and the extension of such to consensual sadomasochism. These considerations are important to outline when interpreting the development of the judicial outlook on consensual activities and such will be highlighted in a single “cross-jurisdictional” timeline, found in Chapter 2 of this dissertation.

This dissertation shall focus predominantly on private consensual sadomasochism bringing varying degrees of bodily harm and injury. It shall not consult other forms of sexually divergent practices and will be limited to case law and legal literature dealing specifically with consent to private consensual sexual violence.

A further limitation of the research problem is that there is a dearth of information regarding the legal position of consensual sexual violence within South African law. Therefore, this research shall be limited to the specific crimes of assault arising in either common assault or assault with intention to do grievous bodily harm. Further, any potential legal aids from the South African Law Reform Commission are absent, based on the minimal prior legal research within South Africa regarding the topic.

1.6 Research Goals

Among the more pressing goals for the research, the dissertation intends to show a predictive outline of the approach of a South African court if interpreting private consensual sadomasochism. This is facilitated by the goal of deciphering what may be defined as valid consent to permissible bodily harm within the consensual sexual dynamic between adult partners.

In the exploration of the aforementioned goal, the research dissertation shall harness the Constitutional values of South Africa, paying homage to the personality rights to bodily safety, security and integrity, freedom of expression, the right to privacy and the right to human dignity. The goal of this segment of the research will be to show the protected rights of the participants that engage in consensual sexual sadomasochism and the interpretation by the State when limiting such rights.

Another goal of the research is to surface the current South African policy considerations regarding consensual bodily harm. This will inevitably attempt to determine whether consensual sadomasochism is inherently a victimless crime, or whether such may be afforded some degree of legal protection, based on the contemporary South African legal influences.

Ultimately, the core goal of the research dissertation is to review and interpret the relevant South African inventory of legal aids that may be applied to potential sadomasochistic practices within the legal system. This will be induced by juxtapositions to relevant findings and submissions of English and Canadian law and whether there would be any direct applicability of the values of the foreign perspectives in the South African outlook of the practice. The research shall also be supported by the goal of investigating the internal safeguards and controls, belonging to those that partake in consensual sadomasochism and forming part of the broader arch of the 'kink' community.

1.7 Research Methodology

The dissertation shall implement a qualitative research methodology in its approach in dealing with the problem statements. It is not the objective of the dissertation to seek to employ an empirical approach within the research. The core of the qualitative research approach will be hinged upon legal principles that cover applicable sectors of interest within the criminal law of

South Africa, England and Canada and the possible extension of these laws in interpreting acts of consensual sexual violence in South Africa.

Further, the dissertation shall implement a cross-jurisdictional timeline that draws on cases from both England and Canada regarding consensual sexual violence in hopes of creating a predictive outline with South African jurisprudence if hearing such a matter. The research shall be juxtaposed to the applicable Constitutional provisions in hopes of bolstering the perspective of human rights and personal autonomy amongst consensual partners. The prosecution for the unlawful infringement of the right to privacy, human dignity, and freedom of expression is a constitutional cornerstone that is inspired by the Bill of Rights.³² Such shall be explored by an inquiry into South African law (statutes, cases, public policy and the Constitution) and an exploration of foreign jurisdictional viewpoints in hopes of determining whether South Africans who participate in acts of consensual sexual violence should be subject to a criminal prosecution for offences against another person.

References will be attributed to applicable legislation, case law and legal literature that correlate with the research questions. Further, academic writings in the form of scholarly submissions and journal articles, along with relevant textbooks and information from websites, will be consulted.

1.8 Terminology and Definitions

- Dominant ('dom'): An individual who controls the sadomasochistic encounter by inflicting physical force and/or verbal force.
- Submissive ('sub'): An individual who is the recipient to such force from the dominant
- BDSM: An acronym for activities involving *bondage-discipline-domination-submission-sadomasochism* and includes role-playing or activities such as cutting and marking, movement limitation, sensory deprivation and hitting.
- 'Kink' Community: Members of the broad group of individuals who engage in minority sexual practices that form part of a collective minority sexual group.
- Sadomasochism:
 - sadism – arousal by inflicting physical pain upon another person

³² Chapter II of the Constitution of the Republic of South Africa.

- masochism - arousal by personally experiencing physical pain
- The merging of the two concepts creates a union of a practice that involves the administration and the receiving of pain between partners.
- Scene: The colloquial term for a BDSM/sadomasochistic encounter.

1.9 Structure of the Dissertation

Six chapters shall support the discussion of this dissertation:

Chapter one (1) outlines, *inter alia*, the purpose, aims, objectives, goals and the research methodology of the dissertation.

Chapter two (2) sets the stage for the conceptualisation of the sexual practice of consensual sadomasochism. This will be evaluated in light of the cross-jurisdictional timeline that interprets the progression of relevant foreign cases arising in England and Canada respectively. This will draw inspiration from the element of consent in sustaining practices that involve variant degrees of bodily harm and how such has been progressively interpreted by the relevant courts. The South African perspective shall be illustrated in light of consent to bodily harm and the investigation of the applicability of the *volenti non fit iniuria* principle to the potential existence of consensual sadomasochism before the criminal law.

Chapter three (3) builds on the established principles of consent to bodily harm by juxtaposing the ever-growing legal considerations of public policy. The concept of public policy, interpreting consensual sadomasochism, will be inspected by the relevant submissions from legal sources from England, Canada, and South Africa respectively. This will pay homage to the expansion of sadomasochistic material into the public sphere and the resounding influence of the porn industry and in supporting such. Finally, the applicable Constitutional provisions will correlate to the legal considerations of the *boni mores* and Ubuntu in shaping the South African public policy and its combating of the infliction of harm unto the public.

Chapter four (4) reflects an evaluation of the autonomy rights of human dignity, freedom of expression and privacy. These rights are inherent to the participants of consensual sexual violence and demand a reciprocal obligation of care from the State and other members of society. This will be investigated in the assessment of the legal systems of England and Canada

and by the precursor international conventions, namely the Universal Declaration of Human Rights,³³ and the European Convention on Human Rights.³⁴ The South African Constitution will serve as the primary guide in the reflection of the aforementioned autonomy rights and will attempt to draw an equitable resolve regarding the autonomous actions of consenting adults in the practice of consensual sadomasochism.

Chapter five (5) considers at the legal anomaly of victimless crimes and the influence of a broad public morality upon the criminal law. This will seek to explore whether consensual sexual violence falls within the bracket of a victimless crime in juxtaposition to other crimes that inhabit this niche. Guidance will be sought from the submissions of the colloquially coined ‘Wolfenden Report’ and the Hart-Devlin debate.³⁵ The chapter unravels into the consideration of victimless crimes within South Africa and the progressive attempts of the Constitution to decriminalise private consensual actions that bring no harm unto others.

Chapter six (6) concludes the discussion of the dissertation and amalgamates the arguments made in each chapter, resolving in recommendations and final concluding remarks.

³³ UN General Assembly "Universal Declaration of Human Rights" (1948).

³⁴ Council of Europe "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950).

³⁵ Great Britain. Departmental Committee on Homosexual Offences and Prostitution *Report of the Committee on Homosexual Offences and Prostitution* (1957).

CHAPTER 2: THE EMERGENCE OF CONSENSUAL SADOMASOCHISM WITHIN ENGLISH AND CANADIAN CRIMINAL LAW AND THE GAP-IN-KNOWLEDGE IN SOUTH AFRICAN LEGAL LITERATURE

"Like alcohol abuse, binge eating, and meditation, sadomasochism is a way people can forget themselves." - Roy Baumeister, Ph.D., Professor of Psychology, Case Western Reserve University.

2.1 Introduction

Consensual sadomasochism has emerged as a developing atypical sexual practice in the contemporary international sphere amongst consenting adults.³⁶ Sexuality itself has been an important aspect in the study of human self-actualisation.³⁷ With this understanding, the concept of sexual expression has slowly progressed within the legal system of South Africa, ushered into the democratic age by a flurry of Constitutional perspectives and supporting legislation³⁸.

Homosexuality, once being a punishable crime under the Apartheid regime,³⁹ is now legally accepted within South Africa; and endures within a gradual expanse.⁴⁰ What is evident is that the State recognises equality amongst all citizens, encumbered with one's sexual orientation. However, the role of some religious organisations,⁴¹ and other bodies have been the predominant harbingers of scrutiny and discrimination for homosexuals, and other sexual minority groups such as the LGBT,⁴² within the republic. The constitutional right to sexual

³⁶ B. O'Dowd 'Consensual sadomasochism' (2009) 3 *Mako: NSU Undergraduate Student Journal* 2.

³⁷ A. De Wet 'Human rights and sexuality - Reimagining the language of equality towards transformation in and through education' (2017) 31 *South African Law Journal of Higher Education* 113.

³⁸ The Civil Union Act 17 of 2006 of South Africa is a beaming example of the South African legislature accepting same-sex couples to be joined in matrimony.

³⁹ See the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (9 October 1998) where the act of sodomy was decriminalised within South Africa.

⁴⁰ A.M. Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law (2015) 15 *African Human Rights Journal* 278.

⁴¹ Ibrahim Ibid 270.

⁴² K.L. Collier et al. 'Sexual orientation and gender identity/expression related peer victimization in Adolescence: A systematic review of associated psychosocial and health outcomes' (2013) 50 *Journal of Sex Research* 7, 17.

expression allows for the facilitation of legal cognisance of these forms of sexuality; however morally divergent such may be to the public.

The essence of the ‘deviant’ act of consensual sadomasochism is to derive sexual pleasure in the application of physical violence and pain.⁴³ Thus, the objective that exists at the root of the practice is to express sexual gratification.⁴⁴ The practice can be defined as the participation of two or more consenting adults who are aware of the reasonable apprehension of receiving and/or delivering physical harm unto each other.⁴⁵

The notion of individuals inflicting physical harm unto one another, solely to draw sexual gratification, stands as a prerogative for the State to intervene and control such practices. However, drawing inspiration from the recent developments of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V),⁴⁶ it is relevant within this early inquiry regarding sadomasochism to illustrate that these classifications have been removed from the medical niche.⁴⁷ The practice of sadomasochism proves to be an activity that should not be viewed as one that is practiced by those who suffer from any form of mental disorder. The focal avenue of consideration would be hinged upon the relevant criteria of acceptable and lawful boundaries of the practice by the State itself.

BDSM and sadomasochism bring with it a flurry of unique jargon and colloquialism. The terms ‘dominant’ and ‘submissive’ (‘Dom/Sub’) are the common roles for partners within the dynamic of the relationship.⁴⁸ Generally, a ‘dominant’ exhibits dominium over the ‘submissive’ by the exercise of physical force or verbal control.⁴⁹ A ‘submissive’ may desire the dominant to inflict physical force unto their bodies in the hope of deriving sexual gratification via the stimulus of pain.⁵⁰ A ‘submissive’ might also desire to be humiliated in the form of verbal abuse from the ‘dominant’.⁵¹ The pertinence of arriving at a legal interpretation of consensual sadomasochism lies within the assessment of the magnitude of the physical aggression exerted

⁴³ T. Bennett ‘Sadomasochism under the Human Rights (Sexual Conduct) Act of 1994’ (2013) 35 *Sydney Law Review* 541.

⁴⁴ McAnulty *Sex and Sexuality/ 3 Sexual Deviation and Sexual Offences* (2006) 728.

⁴⁵ Bennett ‘Sadomasochism under the Human Rights (Sexual Conduct) Act of 1994’ (2013) 543.

⁴⁶ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 5 ed. (2013).

⁴⁷ The concepts of the conditions of “Sadism” and “Masochism”.

⁴⁸ W. Pawlowski ‘BDSM: The ultimate expression of healthy sexuality,’ in W.J. Taverner and R.W. McKee (eds) *Taking Sides: Clashing Views in Human Sexuality* (2009) 70-75.

⁴⁹ A. Avedano ‘Violence and veneration: Tapping a sadomasochistic vein in the American psyche’ (2014) 7 *Mythological Studies Journal* 15.

⁵⁰ O’Dowd ‘Consensual sadomasochism’ (2009) 4.

⁵¹ Chancer as cited in O’Dowd above, 14.

upon the submissive's body and the impact of the actual bodily harm that is brought upon their psychological framework.⁵²

Part of the focus of this chapter shall derive itself from the jurisdictions of English and Canadian law respectively when interpreting consensual bodily harm. Both of these jurisdictions have endured skirmishes with the legality of consensual sadomasochism and have produced notable precedents regarding the lawfulness of the practice. The cross-jurisdictional timeline of comparison between the developments within the aforementioned jurisdictions shall be elaborated upon in fact, relevance, and the link to the possible South African perspective of consensual sadomasochism. It is the intention of this chapter to expose and analyse the developments of the legal positions of England and Canada regarding relevant examples of consensual sadomasochism and the progressive interpretation of varying degrees of bodily harm from these practices.

Lastly, the interpretation of the facts and legal developments regarding the cases that inhabit the judicial timeline will be explored holistically. These submissions will attempt to give credence as to the development of the sadomasochistic acts and their legal interpretation within the contemporary sphere. These findings of consensual sadomasochism will accordingly be juxtaposed to existing doctrines and requirements within the defence of consent to bodily harm and injury within South African criminal law.

2.2 The Judicial Timeline of Comparison and Development of Consensual Harm and Sadomasochism within England and Canada

2.2.1.) 1934: *R v Donovan* [1934] 2 KB 498 – England

The English case of *R v Donovan* sets the stage for the foundations of this jurisprudential timeline.⁵³ The case ushered through the notion of the state prosecuting an incident of assault, arising in actual bodily harm, where the harm suffered is beyond transient and trifling. The case involved the caning of a 17-year-old girl by an adult male, solely for purposes of sexual gratification.⁵⁴ It was explored that even though the victim had given consent to the beating, such consent does not make lawful the unlawful act of assault, or indecent assault. It is clear

⁵² Ibid.

⁵³ *R v Donovan* [1934] 2 KB 498.

⁵⁴ N. Padfield *Criminal Law* 8 ed. (2012) 104.

that the court viewed the act as inherently unlawful, based on its juxtaposition to the definition of actual bodily harm. Furthermore, the minority of the victim proved to be a decisive factor in the decision itself.

The importance of *Donovan*'s submission is that it summons a test of assessment where actual bodily harm exists, deliberately inflicted to affect an individual's well-being. Thus, at the early stages of assessing degrees of harm upon persons, along with the applicable stage of involvement by the state to prosecute such harm, the English courts had tacitly outlawed sadomasochism, even if such was yet to be coined. It is evident that English courts, even in 1934, had the interest of safeguarding the sanctity of the 17-year-old girl's bodily integrity, just as the South African Constitution does.⁵⁵ Swift J had stated,

*'[I]t is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.'*⁵⁶

It is clear, adhering to *Donovan*'s principles, that when sadomasochistic acts between consenting partners come to light in the eyes of the State, the English court had prosecuted the participant who had caused actual bodily harm. To the court, such a harm which interferes with the comfort and health of the complainant is beyond transient and trifling; even if such is not permanent in its existence.⁵⁷ Furthermore, the focus of a prosecution by the State is not dependent upon the element of consent being sustained in a consensual sadomasochistic encounter.⁵⁸ Such a stance by the court proved to be dependent on the existence of actual bodily harm inflicted between the consenting parties, thus vitiating consent as a defence.

However, what is problematic in retrospect to *Donovan* is nestled within the court's initial inquiry of actual bodily harm. The nature of the harm itself is not the only factor in determining whether consent should sustain itself as a valid defence in a modern legal system. The age and capacity of the partners also prove to shape the legal validity of consent to actual bodily harm. Therefore, compartmentalisation of the elements of the consensual activity must be interpreted by the relevant court in order to draw an adequate interpretation of the act itself.

⁵⁵ Section 12 of the Constitution of the Republic of South Africa.

⁵⁶ The words of Swift J, commenting in *R v Donovan* [1934] 2 KB 498, 509.

⁵⁷ Ibid.

⁵⁸ Ibid.

2.2.2) 1991: *R v Jobidon* 1991 SCR 714 – Canada

The Canadian case of *R v Jobidon* was an important judgement in determining the validity of consent to bodily harm in Canada.⁵⁹ Sadomasochism promises the actualisation of bodily harm in the inherent nature of the consensual sexual practice. However, the events of *Jobidon* did not involve sadomasochistic activities, but rather a consensual fistfight between two men. This submission can be extended to the concept of actual bodily harm and similar to the practice of sadomasochism. The harm that arose from the events of *Jobidon* can be paralleled to the harm that exists within certain types of sadomasochistic relationships.

A Canadian court shall be justified in balancing the element of consent between participants involved in a physically dangerous activity and the inherently unlawful outcome of the consensual encounter.⁶⁰ The court prosecuted Jobidon for the death of a man who had consented to a fistfight with him. The impact of Jobidon's punch had rendered his opponent unconscious, to which Jobidon continually beat his head, causing severe concussions and resulting in eventual death. The defence of consent to the dangerous activity did not sustain itself as a valid defence to the Ontario court. With this perspective, it is supported by the court's reasoning that the deceased's consent could not extend to his own death; thus, liability for manslaughter still attached to Jobidon.⁶¹

Without deviating from this chapter's focus on the assessment of the validity of the element of consent, it is clear that the Canadian courts, as early as 1991, highlighted that certain consensual activities may result in actual or grievous bodily harm occurring, and even the possibility of death to be rampant.

*'The principal objective of the criminal law is the public identification of wrongdoing qua wrongdoing which violates public order and is so blameworthy that it deserves penal sanction.'*⁶²

A court within South Africa, if faced with such similar facts, will have substantial and compelling reasons to prosecute an individual who has caused such harm, even if consent is established between participants to this dangerous activity. This is based on the inherently dangerous physical practice of sadomasochism, capable of causing actual bodily harm unto an individual, thereby infringing their bodily safety and security.⁶³ Thus, identification of the

⁵⁹ *R v Jobidon* (1991) 2 SCR 714.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² *R v Mabior* (2012) SCC 47 at para 23.

⁶³ Section 12 of the Constitution of the Republic of South Africa.

intensity of the harm exerted from the consensual encounter is paramount in determining the involvement of the State in such activities. However, socially sanctioned consensual physical activities stand at loggerhead with such State-protected norms. Sports such as boxing and rugby, and medical procedures along the lines of surgery, bring with them a similar intensity of physical bodily harm that is viewed in a more favourable light in the eyes of the State.

This is an example of the early developments within the international conception of consent regarding activities that render physical bodily harm. It was clear, within the international perspective at this stage, that the existence of actual bodily harm will vitiate consent as a defence to a consensual physical practice. The only compelling definition of actual bodily harm at this node in the timeline proves to be harm that is not ‘transient and trifling.’⁶⁴ This definition is common in the assessment of harm unto a person if one is a victim to an assault. In the extreme case of participants engaging in consensual activities that result in actual bodily harm, physical impairment, or death; a court would have cause to disregard the defence of consent and to prosecute a perpetrator as being the harbinger-of-the-harm.

2.2.3) 1992: *R v Boyea* 156 JPR 505 – England

The case of *R v Boyea* presents itself just before the zenith of sadomasochism’s quarrel for legality.⁶⁵ The case of *Boyea* manifested itself within the jurisdiction of England, alluding to the infliction of physical harm within a sexual dynamic. The complainant in *Boyea* had suffered internal vaginal injuries when the defendant had inserted his hand into her vagina. The defendant raised the defence of consent, stating that his actions were in accordance with consenting to the enhancement of the shared notion of sexual gratification between him and his partner.⁶⁶

The court asserted its inquiry to consent to actual bodily harm. The extent of the injuries sustained by the complainant proved far too severe to allow consent to sustain itself as a valid defence for the accused. The focus of the harm inflicted being beyond the threshold of transient and trifling proved to be sufficient for the court to prosecute the accused on indecent assault.⁶⁷ This conviction is noteworthy, for one would have expected the passing of a harsher sentence

⁶⁴ *R v Donovan* [1934] 2 KB 498.

⁶⁵ *R v Boyea* (1992) 156 JPR 505.

⁶⁶ J. Moulds ‘Is society still shackled with the chains of a 1993 England? Consent, sado-masochism and *R v Brown*’ (2015) 1 *UniSA Student Law Review* 77.

⁶⁷ *R v Boyea* (1992) 156 JPR 505.

by the court, by virtue of the actual bodily harm that was inflicted. However, the defence of consent to actual bodily harm was not available, for the defendant had caused injuries that transcended the threshold of permitted actual bodily harm.⁶⁸ Here, once again, the court had noted that the harm caused was beyond ‘transient and trifling’. Such proved to be the cypher for disregarding consent as a defence to such activity, following the stance of *Donovan*,⁶⁹ and *Jobidon*.⁷⁰

The court also considered the development of the law regarding the ‘level of vigour’ in forms of sexual practices since its yesteryears.⁷¹ However, the development of the sexual attitudes from 1934 could not emancipate the conduct exhibited in *Boyea* based on the intensity of the actual bodily harm that had occurred.⁷² The court was of the final opinion that had the injuries been transient and minor, consent would have sustained itself as a valid defence in exempting liability for the defendant. To the reasoning of the court, it was unimaginable for the complainant to have reasonably consented to such serious injuries that had caused actual bodily harm.

2.2.4) 1993 - 1994: *R v Brown* [1994] 1 AC 212 – England⁷³

The most notable legal precedent emerging within the interpretation of the practice of sadomasochism, and its skirmish with the possibility of legal acceptance, originated from the English case of *R v Brown*.⁷⁴ The House of Lords was faced with a graphic portrait of the underground BDSM scene, occurring for a number of years between consenting adult homosexual men. The culmination of legal factors within this case involved consensual sadomasochism and its legal standing in contemporary society, public policy regarding the exposure of dangerous physical practices to the public, and the concept of the State’s control of violence amongst its citizens.⁷⁵

⁶⁸ Ibid.

⁶⁹ *R v Donovan* [1934] 2 KB 498.

⁷⁰ *R v Jobidon* (1991) 2 SCR 714.

⁷¹ Moulds ‘Is society still shackled with the chains of a 1993 England? Consent, sado-masochism and *R v Brown*’ (2015) 78.

⁷² *R v Boyea* (1992) 156 JPR 505.

⁷³ It should be noted that this case was decided in the 1993 and reported in 1994.

⁷⁴ *R v Brown* [1994] 1 AC 212.

⁷⁵ Ibid.

The facts of *Brown* are essential to this dissertation's inquiry as to the consensual nature of certain sadomasochistic relationships and the activities therein.⁷⁶ A group of homosexual men had met over a number of years to engage in consensual sadomasochism between one another. Their activities included beatings of the human body, piercing of the male genitals, and other acts of torture that brought the breakage of skin and the release of blood.⁷⁷ The actions expressed flourishes of both actual bodily harm and serious bodily harm, bringing a degree of pain that was beyond transient and trifling within the consensual relationships.⁷⁸

What is pertinent within the facts of *Brown* is that the men had recorded their consensual sadomasochistic activities and disseminated the tapes to members within their group.⁷⁹ 'Operation Spanner',⁸⁰ as it was colloquially coined, commenced when an unrelated investigation by police unearthed the sadomasochistic activities that occurred between the men. The films that were later discovered by the police and proved most alarming as the actions depicted torture and the possibility of murder.

After news of the films had circulated throughout the British media, the orchestrators of the sadomasochistic activities pleaded guilty to the charges of assault laid against them in the trial court. In their defence, they had submitted that their actions were consensual, aimed to derive sexual gratification between partners by utilising pain as a stimulus. Furthermore, it was put forward that the men had participated in such activities over a period of ten years with consenting partners. Allegedly, the sadomasochistic encounters did not yield any permanent bodily injuries and the men had practiced such for a considerable period of time. Additionally, the footage had not been exposed to the public until the police had stumbled upon the films.

The accused men were charged with assault causing bodily harm and injury, under sections 20 and 47 of the Offences Against the Person Act, respectively.⁸¹ Section 20 of the Act focusses primarily on the unlawful and malicious wounding of an individual by another, with or without the use of a weapon, causing grievous bodily harm.⁸² Such an injury can be met with penal sanction according to the ambit of this section within the Act⁸³. Section 47 of the Act supports

⁷⁶ A.P. Simester et al. *Simester and Sullivan's Criminal Law Theory and Doctrine* 6 ed. (2016) 784.

⁷⁷ *R v Brown* [1994] 1 AC 212.

⁷⁸ See *R v Donovan* [1934] 2 KB 498.

⁷⁹ M. Giles 'R v Brown: Consensual harm and public interest' (1994) 57 *The Modern Law Review* 102.

⁸⁰ *R v Brown* supra.

⁸¹ Sections 20 and 47 of the Offences against the Person Act 1861 of the United Kingdom.

⁸² Ibid at section 20.

⁸³ Ibid.

the aforementioned section, laying the foundation of imprisonment for anyone convicted of an assault that causes such bodily harm.⁸⁴

The trial judge had ruled that the defence of consent would not sustain itself against the charges of assault, for the intensity of the harm caused by the sadomasochistic practice nullified the prospects of the defence. The men later appealed the decision in the House of Lords, in hopes to emancipate the legality surrounding consensual sadomasochism that caused actual bodily harm. The appellants wished to affirm that such a practice could be recognised as an exception to the charge of assault, based on the sustained element of consent.

The central issue to *Brown* within the House of Lords was whether consent to private sadomasochistic activities between adults rendered such an act to be lawful, thus sustaining consensual sexual violence as a defence.⁸⁵ Furthermore, the House of Lords attempted to decipher whether consensual sexual violence to derive pleasure and gratification was a mitigating factor to the assaults that had occurred when interpreting the charges of the accused men⁸⁶ in light of public policy considerations.

An investigation at this critical juncture of judicial comparison regarding the legal development of consensual sadomasochism must be explored.⁸⁷ The fundamental inspection of *Brown* reveals the inherent danger of sadomasochism, occurring in assault bringing actual bodily harm, had sufficient cause to be punished under the Offences Against the Person Act in the majority view of the House of Lords.⁸⁸ The consensual actions of the men, even if conducted within private confines, had fallen within the public domain based on the dissemination of the films depicting the consensual practices. Upon assessment, the right to individual privacy is weighted against the protection that the State owes to the public at large. The State, in its paternalistic approach, assumes the herculean task of safeguarding the interests of the public as a whole. Thus, the actions of the accused men satisfied the definition of the crime of assault, expressed in sections 20 and 47 of the aforementioned Act, allowing the House of Lords to prosecute the offenders and awarding penal sanction.⁸⁹

⁸⁴ Ibid at section 47.

⁸⁵ Giles 'R v Brown: Consensual harm and public interest' (1994) 101.

⁸⁶ R v Brown [1994] 1 AC 212.

⁸⁷ See *Attorney General's Reference* (No 6 of 1980) [1981] QB 715 where an assault that is intended or which is likely to cause bodily harm, accompanied by indecency, shall prove to be an offence; irrespective of consent. This, however, shall only materialise if the injury caused is not transient or trifling.

⁸⁸ Sections 20 and 47 of the Offences against the Person Act 1861 of the United Kingdom.

⁸⁹ Ibid.

However, the House of Lords was not swayed in favour of the prosecution in a totality of judicial support.⁹⁰ The majority stood at loggerhead with the minority regarding the interpretation of the sadomasochistic acts that were practised and the actual harm that was caused; not only to the consenting ‘victims’ but to the public who had become so erroneously exposed to the practices.⁹¹ Generally, the basic starting point in the assessment of an assault, as accepted by the House of Lords, is the absence of consent between the offender and the victim. However, as drawn out by the inspection of the court, there are instances where consent is not given and no assault occurs, even if an individual suffers actual bodily harm, such as therapeutic surgery.⁹² The ambivalence that was created by the presence of consent in *Brown* did not give credence to the statutory definition of an assault as prescribed by the wording of the Act.⁹³

Upon a critical interpretation of the case in point, the House of Lords was faced with a two-tier question. Firstly, whether the court should consider public policy and supporting interests in dealing with what appears to be prima facie illegal behaviour in an attempt to allow such to go by unpunished.⁹⁴ Secondly, whether the court may harness the public’s interest to criminalise those activities that could be deemed as ‘lawful’ behaviour.⁹⁵ These notions pave the path for the emerging public policy considerations as a facet of a court’s assessment regarding the legality of consensual sadomasochism that causes varying degrees of bodily harm.

The majority, held sway by Lords Templeman and Jauncey, began their assessment in line with the statute,⁹⁶ focussing on the infliction of actual, or grievous bodily harm between the consenting partners. The actions of the sadomasochists, juxtaposed to the wording of sections 20 and 47,⁹⁷ proved to fall within the definition of unlawful conduct, constituting an offence. The exceptions to the general rule of prosecuting acts that fit the prescribed statutory bar, generally falling into the sphere of consent, may allow a court to exempt inherently unlawful behaviour. Such exemptions, or grounds for justification, are nestled within the concept of public policy. Lords Templeman and Jauncey collectively wished to ascertain whether, by

⁹⁰ Padfield *Criminal Law* (2012) 106.

⁹¹ ‘Victims’ is placed in inverted commas, for the theory of victimless crimes is prevalent at a later stage within this dissertation.

⁹² Giles ‘*R v Brown: Consensual harm and public interest*’ (1994) 105.

⁹³ Offences against the Person Act 1861 of the United Kingdom.

⁹⁴ Giles op cit note above 92.

⁹⁵ Ibid.

⁹⁶ See sections 20 and 47 of the Offences against the Person Act 1861 of the United Kingdom.

⁹⁷ Ibid.

virtue of policy considerations, sadomasochistic acts might fall within the scope of such accepted exemptions. Ultimately, Lord Templeman stated that,

'It is an unlawful act to beat another person with such degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.

*Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised. I would answer the certified question in the negative and dismiss the appeals of the appellants against conviction.'*⁹⁸

Lord Templeman stated further that it is an 'evil thing' to derive pleasure from the infliction of physical pain. This is seemingly contradictory to other lawful practices that endure within society, such as the sports of boxing and mixed martial arts. These sports, and their international following, reverberate the support society has for the infliction of pain, as such is a legally sanctioned event. It could be argued that individuals go so far as to derive 'pleasure' in watching these athletes bludgeon and inflict various degrees of bodily harm within the sanctioned event.

The minority judgement was derived from Lords Mustill and Slynn. Lord Mustill's perception, regarding the act of sadomasochism, sheds light on the importance of consent as a factor in the assessment of criminal liability in the manifestation of this type of actual bodily harm. The absence of any supporting legal literature and decided cases at the time proved to diminish Lord Mustill's attack against the majority. However, Lord Mustill musters the perspective of the:

*'[E]xcessive complication of using the public policy interest to annul the defence of consent because of the harm, and then using it again to recreate it in some cases.'*⁹⁹

Lord Mustill was of the opinion that the submissions of public policy, and the safeguarding of such public's exposure, are insufficient as a viable factor to solely criminalise activity that is otherwise lawful. Upon a critical analysis of the reasoning of the minority, it is imperative to note that sadomasochism, whether consensual or not, was not regarded as lawful. Therefore, Lord Mustill's interpretation may be viewed in light of the lawfulness of an activity, however, the activity in point was not deemed to be inherently lawful.

Lord Slynn's interpretation rested upon a distinction between grievous bodily harm of the committed acts and its separation from lesser harms, such as actual bodily harm. Lord Slynn's

⁹⁸ The words of Lord Templeman in *R v Brown* [1994] 1 AC 212.

⁹⁹ Giles '*R v Brown: Consensual harm and public interest*' (1994) 108.

assessment was strained by the rigorous concept of consent to bodily harm and its existence within sadomasochism. This viewpoint derived from the fact that actual bodily harm had occurred and was consented to by the participants. It is evident that the sustainability of the defence of consent to actual bodily harm before the House of Lords could only be assessed by comparison to a holistic interpretation factors, not exclusive to policy considerations and the public interest. Upon inspection, it is submitted that the reasoning for the minority in bolstering the inquiry into the element of consent was to probe the possibility of the existence of a legal safeguard for the accused sadomasochists that had inflicted actual bodily harm.

Between the majority and minority split, Lord Lowry's perspective took centre stage. It is believed that within this precedent set down by the House of Lords, Lord Lowry's judgement was sufficient in propelling the majority's viewpoint and opted for the prosecution against the accused sadomasochists.¹⁰⁰ Lord Lowry commenced by drawing upon the concept of an assault within English law. He dictated that such an assault is lawful if consented to, however, if there are policy considerations that are shared by the public that advocate against the practised behaviour, such consensual assaults can be deemed as unlawful. To the majority, there was no 'good reason' for allowing sadomasochism to assume a position upon the mantle of accepted exemptions to assaults causing actual bodily harm.¹⁰¹ The inherently violent practice detracted from what the public would view as acceptable. This exploration by the House of Lords proved that consent would not emancipate the practice of sadomasochism as being lawful. What is noteworthy here is unlike *Donovan* in the past,¹⁰² the actual bodily harm was assessed in relation to not only its consensual validity but also the steady emergence of the notion of public policy. Public policy proves to play a predominant role in a court's holistic investigation of the legality of consensual sadomasochism and its possible criminalisation.

With the developing legal canvas of *Brown*, it is clear that the House of Lords considered the validity of consent to an assault that brings actual bodily harm and the concept of public policy in a stark dichotomy¹⁰³. According to *Brown*,¹⁰⁴ consent is far from an intangible shield when it comes to consensual sexual violence. Lord Templeman's judgement echoes that sadomasochism is more violent than sexual, far from positive within the public's interest, enough to radiate in tones of moral outrage within the community that the law itself wishes to

¹⁰⁰ Ibid 109.

¹⁰¹ Ibid.

¹⁰² *R v Donovan* [1934] 2 KB 498.

¹⁰³ Simester et al. *Simester and Sullivan's Criminal Law Theory and Doctrine* (2016) 784 - 785.

¹⁰⁴ *R v Brown* [1994] 1 AC 212.

safeguard. On a closer inspection of the case in point, consent alone to the materialisation of actual bodily harm in England proved to be a hollow defence for the appellants. However, the House of Lords was careful in outlawing all forms of consensual physical activity that bring with it actual bodily harm. A consensual activity that brings foreseeable harm within socially sanctioned and accepted behaviour would still allow such a defence of consent to stand firm for an accused. This, in culmination, appeared to be sufficient reason for the majority opting not to develop a defence of consensual sadomasochism for the accused men.

The defence of consent to the infliction of physical harm may rightly be vitiated by the force in which such is inflicted.¹⁰⁵ In reflection of *Brown*, the exertion of physical force inflicted upon the participants, radiating violent conduct, appears to be a factor that gives credence to the prosecution of consensual sexual violence. The defence of consent seemingly falls away in this stead. The act of consensual sadomasochism, to the House of Lords, was cruel and had no place within the public's sphere. Furthermore, it is clear that the prosecution of this act is also supported by the State's notion to control violence within the public sphere.

2.2.5) 1995: *R v Welch* (1995) 25 OR (3d) 665 – Canada

The stance taken by the House of Lords in disregarding the defence of consent to bodily harm, and prosecuting consensual sadomasochism, in *Brown* served as a stark reminder as to the legality of the practice within the mid-1990's by English courts. The case of *R v Welch* presents a judgement that attempted to shatter the 'grey-area' regarding the legality of consensual sexual violence in Canada.¹⁰⁶ The jurisprudence regarding the crime of assault,¹⁰⁷ and the variant offences within its bracket have been established and developed in jurisdictions across the world.¹⁰⁸ The nature of the assault brought upon the human body may cause injury, bodily harm and even death; depending on the force that is applied.¹⁰⁹

The case of *Welch* brought with it a flurry of judicial interpretation regarding the element of consent, which plays a decisive role within this chapter and the dissertation at large.¹¹⁰ The

¹⁰⁵ Simester et al. *Simester and Sullivan's Criminal Law Theory and Doctrine* (2016) 788.

¹⁰⁶ *R v Welch* (1995) 25 OR (3d) 665.

¹⁰⁷ Burchell *Principles of Criminal Law* (2013) 577 states that an assault occurs where an individual unlawfully and intentionally applies force to the person of another individual, or inspires the apprehension that such an individual shall receive such a force unto their person.

¹⁰⁸ Actions that inhabit the variant bracket of assaults, *inter alia*, include common assault, indecent assault, aggravated assault, and sexual assault.

¹⁰⁹ Burchell op cit note 6 above, 580.

¹¹⁰ *R v Welch* (1995) 25 OR (3d) 665.

complainant's version of the events involved the appellant (Welch) tying her to his bed, beating her buttocks with his belt, penetrating her vagina with both his penis and fingers and placing an object into her rectum.¹¹¹ The complainant also put forward to the court the harrowing events that followed the alleged assault. The complainant had suffered bleeding from her rectum for at least three days, along with considerable bruising across her body.¹¹² The accused agreed that he had behaved in such a manner, however, sublimated by the consent of the complainant. Mr Welch, in the Court of Appeal for Ontario, appealed the sentence of sexual assault set down by the trial court.¹¹³

It was the position of the Court of Appeal to determine whether the element of consent existed between the parties, and if such were evident, would consent sustain a valid defence against the crime of sexual assault?

The court began by following the common law definition of assault, whilst adhering to the precedent of *Jobidon*.¹¹⁴ The validity of the element of consent within this sadomasochistic activity proved to be shattered by the development in the Canadian legal system regarding an assault that causes actual bodily harm.¹¹⁵ The common law principles applied and laid down in *Jobidon* moulded the extent of a Canadian court's tolerance of consent to specific degrees of bodily harm. As expressed in *Jobidon*, certain consensual activities may result in actual or grievous bodily harm occurring, and even the possibility of death to materialise. Consent as a defence shall be vitiated only if the activities, practised by consenting adults, bring with them such hazardous impairment that infringes the sanctity of human life.¹¹⁶

The Criminal Code of Canada shall now be observed in interpreting the validity of consent regarding this form of sexual assault, juxtaposing the statute's limitations to the acts that have been committed by the appellant.¹¹⁷ Section 271 expressly provides for the punishment of an offender who has committed a sexual assault.¹¹⁸ Section 272 builds on the prosecution of sexual assault by adding a provision highlighting such an assault caused by a weapon, threat to the third party, or causing bodily harm.¹¹⁹ Lastly, section 273 explores the bracket of aggravated

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ *R v Jobidon* (1991) 2 SCR 714.

¹¹⁵ *R v Jobidon* (1991) 2 SCR 714.

¹¹⁶ Ibid.

¹¹⁷ Criminal Code of Canada, R.S.C. 1985 C. 46.

¹¹⁸ Ibid section 271.

¹¹⁹ Ibid section 272.

sexual assault, outlining the severity of the harm caused in the form of wounding, maiming, disfiguration or the endangering of the victim's life.¹²⁰

Under section 273.1 (1) of the Criminal Code of Canada, the application of consent to sexual assault reads as follows:

Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.¹²¹

Lastly, Section 273.1 (2) adds a paramount cog in the machine of consent that exists within this inquiry, namely:

No consent is obtained, for the purposes of sections 271, 272 and 273, where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.¹²²

It is clear, adhering to the aforementioned sections and their ambits, that even if consent had existed between the parties, the appellant's actions paralleled the definition of sexual assault.¹²³

The wounding of the complainant causing rectal bleeding, along with the set of bruises inflicted upon her body finds itself within the niche of aggravated sexual assault in terms of the Code.¹²⁴

The court also noted that in paying homage to considerations such as public policy and public interest,¹²⁵ it cannot allow the alleged 'consensual activity' to endure with the defence of consent. This was in line with *Brown's* meditation, balancing the concerns of the notions of public policy with the consensual sexual act that had occurred.¹²⁶

¹²⁰ Ibid section 273.

¹²¹ Ibid section 273.1 (1).

¹²² Ibid section 273.1 (2).

¹²³ Ibid. See section 271, highlighting sexual assault.

¹²⁴ Ibid. See section 273(1), setting the stage for an aggravated sexual assault.

¹²⁵ Both public policy and public interest shall inhabit a chapter of its own within the dissertation. This will unravel by exploring the applicability and importance of these considerations adopted by the courts when interpreting consensual sadomasochism.

¹²⁶ *R v Brown* [1994] 1 AC 212.

The counsel for the appellant put forward the existence of a blurred line relating to the State's prerogative to prosecute acts it has specifically outlawed, juxtaposed to the existence of inherent human rights, many of which are subjective.¹²⁷ The concepts of individual freedom, autonomy, privacy, public policy, morality and dignity were yet another castanet that the State was faced to silence in deciphering an adequate approach regarding the legality of consensual sadomasochism.

After a rigorous judicial critique of the facts and issues, the court ruled that the crime of assault, nestled within section 265(2) of the Code,¹²⁸ existed in the sexual assault inflicted upon the complainant by the appellant. The court derived its verdict from the extreme use of violence upon the complainant, extending beyond the ambit of bodily harm one could reasonably consent to. This unlawful and intentional application of force, nullifying the possibility of consensual sadomasochism, was sufficient to dismiss the appeal that clung to the defence of consent.

The Ontario Court for Appeal did not recognise sadomasochism as a practice of consensual bodily harm that could validly exist within society. Such conduct between consenting partners did not find itself in any accepted boundaries of consensual violence within the legal system of Canada at the time. It is evident from this judgement that the defence of consent to bodily harm that is not serious in nature will sustain itself as a valid defence for an accused. However, where the bodily harm inflicted is sufficient to injure the consenting partner's health and safety, bringing with it an injury that is beyond transient and trifling, consent to such harm will dissipate as a valid defence. The initial viewpoint of 'transient and trifling' harm is now entwined within the perspective of health and safety of the human body.

On a critical inspection of *Welch*,¹²⁹ the case proves that Canadian courts shall not interpret the undefined 'crime' of sadomasochism solely on the harm that it has brought. A culmination of other legal factors are moulded into the judgement's structure, that being the validity of consent in relation to the harm caused, individual human rights of the participants, and the notions of the doctrine of public policy to such behaviour.

¹²⁷ Dignity, as an example, can be viewed as an inherent, objective and subjective human right that is promised under section 10 of the Constitution of the Republic of South Africa.

¹²⁸ Section 265(2) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

¹²⁹ *R v Welch* (1995) 25 OR (3d) 665.

2.2.6) 1996: *R v Wilson* (1996) 2 CR App Rep 241 – England

The case of *Wilson* was yet another English law example of consensual harm, however, between a husband and wife in the private confines of their matrimonial home.¹³⁰ The case may be remote from the findings of the House of Lords in *Brown*,¹³¹ however, it saw the charge of assault causing actual bodily harm under section 47 of the Offences Against the Person Act,¹³² being brought against Mr Wilson for carving his initials with a hot-knife on the buttocks of his wife.¹³³

The facts, in brief, involved Mrs Wilson expressly asking her husband to brand his initials upon her buttocks during their sexual activity. The carving later turned septic, to which Mrs Wilson sought the medical assistance of a doctor.¹³⁴ The doctor, after learning of the behaviour between the couple, reported Mr Wilson to the local authorities on the allegation of assault. The Crown Court found Mr Wilson guilty of an assault that caused actual bodily harm under section 47.¹³⁵

The decision of the Court in *Brown* dictates that consent to an injury causing actual bodily harm shall not sustain itself as a valid defence for an accused.¹³⁶ This thus proves that the Court's assessment highlighted that actual bodily harm was administered and the activity was unlawful.

Upon appeal against the Crown Court's judgement, a paramount distinction was drawn from that of *Brown*.¹³⁷ The prosecution of Mr Wilson's branding of his wife, which caused actual bodily harm, should be interpreted in light of Mrs Wilson's consent to the act and the encouragement of her husband in committing such. The importance of the Court of Appeal's decision, finding in favour of consent as a defence for Mr Wilson, is pertinent within the broad judicial perspective of consensual harm of this nature. It is evident that *Brown's* ruling does not lay a blanket ban on all forms of consensual harm, as the facts of each case raising consent as a defence must be assessed on its own merits.¹³⁸ Arguably, the case of *Wilson* should not be

¹³⁰ *R v Wilson* (1996) 2 Cr App Rep 241.

¹³¹ *R v Brown* [1994] 1 AC 212.

¹³² Section 47 of the Offences against the Person Act 1861 of the United Kingdom.

¹³³ *R v Wilson* (1996) 2 CR App Rep 241.

¹³⁴ Padfield *Criminal Law* (2012) 106.

¹³⁵ Section 47 of the Offences Against the Person Act 1861 of the United Kingdom.

¹³⁶ *R v Brown* [1994] 1 AC 212.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

viewed in light of consensual sadomasochism, but rather that of the infliction of actual bodily harm and more specifically within the forms of tattooing and bodily adornment.

It is with this finding by the court that consent may sustain itself as a defence to a section 47 prosecution, even if actual bodily harm is administered and intended.¹³⁹ Upon a critical inspection of the judgement, the nature of the harm inflicted must be compared against any corresponding state-sanctioned practices or activities. The consent to the harm caused must be observed, along with the nature of the harm itself, when determining the legality of the practice adopted between the participants.

Perhaps what had given *Wilson* greater exemption from the talons of the criminal law was that the branding was a momentary and once-off event between a husband and a wife. The activity in question is far more likened to the accepted practice of tattooing and should not be classified as that of sadomasochism. However, the findings of the Court are noteworthy in the overall assessment of consensual bodily harm and the categorisation of such harm from accepted physical practices.

2.2.7) 1997: *Laskey, Jaggard and Brown v United Kingdom* 1997 (Application No. 21627/93; 21628/93; 21974/93) ECHR 4 – England

Laskey, Jaggard and Brown v United Kingdom exists as an attempt to combat the English stance on prosecuting consensual sadomasochism.¹⁴⁰ The appellants from the case of *Brown* appealed the judgement of the House of Lords in the European Court of Human Rights.¹⁴¹ Whilst the relevance of consensual sadomasochism played a noteworthy role in the House of Lords, the European Court of Human Rights focused on whether the sadomasochists' rights to privacy were infringed by the investigation of English law.

This viewpoint regarding privacy is not relevant in the inquiry of consent and will be elaborated upon in Chapter 4 of the dissertation. However, for purposes of developing this judicial timeline, the Court¹⁴² found that no infringement to the right of privacy had occurred by the methods implemented by the English law. The State in *Brown* applied the law that was codified in statute,¹⁴³ stressing the responsibility it had in safeguarding and balancing aspects of public

¹³⁹ Section 47 of the Offences Against the Person Act 1861 of the United Kingdom.

¹⁴⁰ *Laskey, Jaggard and Brown v United Kingdom* 1997 (Application No. 21627/93; 21628/93; 21974/93) ECHR 4.

¹⁴¹ *R v Brown* [1994] 1 AC 212.

¹⁴² *Laskey, Jaggard and Brown v United Kingdom* 1997 supra note 140 above.

¹⁴³ See sections 20 and 47 of the Offences against the Person Act 1861.

health and wellbeing against that of sexual violence. Even if such violence was consensual in nature and performed in the privacy of one's own home, the inherently unlawful outcome brought with it the materialisation of actual bodily harm.

2.2.8) 1999: *Regina v Emmett* [1999] EWCA Crim 1710 – England

Within a period of two years from the ruling of the European Court of Human Rights in the case of *Laskey*,¹⁴⁴ English law was faced with yet another sadomasochistic encounter between adults in the case of *Regina v Emmett*¹⁴⁵. Although not as landmark as *Brown*,¹⁴⁶ or as independent as *Wilson*,¹⁴⁷ the case reaffirmed the position regarding consent to such dangerous physical practices.

The appellant (Emmett) appealed against the conviction of assault causing actual bodily harm under section 47 of the Offences Against the Person Act,¹⁴⁸ clinging to the defence of consent to the sadomasochistic behaviour he practiced with a woman. The appellant, on the first occasion, had asphyxiated his partner by fastening a plastic bag around her neck. On the second occasion, he had doused her breasts with lighter fluid and set it alight. On both occasions, the appellant had stated that his partner had consented to the activities and was aware of the inherent harm which was promised.

The practices of the appellant were assessed by a single question: would the consent of the injured woman render such physical practices as lawful?¹⁴⁹ The court noted that the first occasion had brought the woman close to the brink of death by asphyxiation, as she had lost consciousness during the sexual encounter. On the second occasion, the burns to her breasts had caused injury that was beyond transient and trifling, bringing actual bodily harm.¹⁵⁰

The court held that even though the element of consent was established, high-risk and violent activities in the pursuit of sexual gratification, which bring actual bodily harm, are contrary to public policy and the values of the State. Such would stand as a flimsy defence against a prosecution under section 47.¹⁵¹ This viewpoint also draws upon a distinction between acts that

¹⁴⁴ *Laskey, Jaggard and Brown v United Kingdom* 1997 (Application No. 21627/93; 21628/93; 21974/93) ECHR 4.

¹⁴⁵ *Regina v Emmett* [1999] EWCA Crim 1710.

¹⁴⁶ *R v Brown* [1994] 1 AC 212.

¹⁴⁷ *R v Wilson* (1996) 2 CR App Rep 241.

¹⁴⁸ Section 47 of the Offences Against the Person Act 1861.

¹⁴⁹ *Regina v Emmett* [1999] EWCA Crim 1710.

¹⁵⁰ *Ibid.* See also *R v Donovan* [1934] 2 KB 498.

¹⁵¹ Section 47 of the Offences against the Person Act 1861.

result in transient injury and those that bring with it actual and potential harm.¹⁵² Once again, the concept of public policy begins to cascade through the cracks of interpreting the defence of consent to the actual bodily harm raised by an appellant.

The court's ruling adhered to the principles created in *Brown* by emphasising the protection of, *inter alia*, the right to life and the safety and security of an individual's body against actual bodily harm.¹⁵³ These findings in the law of England echo South African constitutional perspectives and the universal understanding of a judicial system that prosecutes individuals who commit violent crimes, even in the pursuit of consensual sexual gratification.¹⁵⁴ On inspection of the matter in point, it is shown that even if *Brown* is not authority for all sadomasochistic cases before a court within England, it attempts to create a test, focussing on the tolerance of a court in permitting actual bodily harm caused that is beyond transient and trifling in nature.

The appeal was dismissed and prosecution upheld against Mr Emmett, as the consent of his sexual partner could not detract from the inherently unlawful activity practised within the sadomasochistic relationship. The asphyxiation and burning proved to be aggravating factors of potential death as a result of the conduct of the Appellant. Both instances of the sexual activities were viewed in the bracket of actual bodily harm that is not transient or trifling within a form of consensual activity that is not sanctioned by the State.¹⁵⁵

At the transition to the new millennium, courts of England and Canada had already established acceptable boundaries regarding the act of consensual sadomasochism. The focus of the materialisation of actual bodily harm in such sexual desires proves to be a pertinent factor within the inquiry regarding the validity of consent to sadomasochism. The act may be coined colloquially as a 'consensual sadomasochism'; however, its definition and interpretation within the veil of England's judicial system remained an assault and a punishable offence.

2.2.9) 2011: *R v J.A.* 2011 SCC 28 – Canada

The defence of consent to bodily injury, and its extension to sadomasochism have been assessed so far in the exploration of relevant findings from Canadian and English law. Both jurisdictions prove similar in their interpretation of consensual sadomasochism, understanding

¹⁵² See *Attorney General's Reference* (No 6 of 1980) [1981] QB 715.

¹⁵³ *R v Brown* [1994] 1 AC 212.

¹⁵⁴ Yet to be discussed and established in Chapter 4 of the dissertation.

¹⁵⁵ Padfield *Criminal Law* (2012) 106.

that consent alone is insufficient to legitimise actions that cause actual bodily harm when a prosecution of assault is brought forward.¹⁵⁶

The case of *J.A.*¹⁵⁷ expands upon the ideology of legal consent to sexual activity, a fundamental principle of sadomasochism, within the jurisdiction of Canada.¹⁵⁸ The inquiry of the court tests the mettle of the defence of consent to sexual activity beyond the periphery and common principles critiqued thus far. The pressing question of whether a court, in attempting to prosecute a sexual assault, would allow consent given *before* a person becomes unconscious to sustain itself as a defence for the acts inflicted upon such a person in their unconscious state. This notion of ‘consent given in advance’ is also pertinent within the development of the State’s interpretation of sadomasochistic practices between sexual partners that involve a state of unconsciousness as an occurrence of the sexual gratification.¹⁵⁹

The nuance of the court’s inquiry in *J.A.* was hinged upon the alleged sexual assault of an unconscious partner. The concept of consent to bodily harm, given by a conscious individual, is widely observed by international jurisdictions as being lawful if the activity consented to is sanctioned by the State. The cases that inhabit this timeline of consensual sadomasochism and related matters involve conscious sexual partners; save for the case of *Emmett*,¹⁶⁰ and so the issue of the impairment of a partner’s legal capacity to consent was not a pressing concern for inquiry. The case of *J.A.* strikes a tremor along the legality of unconscious sexual activity; questioning the validity of consent to sadomasochism given before the state of unconsciousness was brought upon the complainant.

To begin this inquiry delving into the cornerstones of consent to sexual activity in Canada, section 273.1 (1) of the Criminal Code must be mentioned.¹⁶¹ As mentioned earlier, this section expressly provides for consent to sexual activity as being that of ‘the voluntary agreement of the complainant to engage in the sexual activity in question’.¹⁶² The importance of this provision is that it maintains the voluntariness of the element of consent to the sexual activity, at the behest of the complainant. An individual who has given consent is free to voluntarily

¹⁵⁶ See *R v Brown* [1994] 1 AC 212 and *R v Welch* (1995) 25 OR (3d) 665 regarding the emergence of the perception of public policy and inherent human rights of the accused as factors of assessment in sadomasochistic cases.

¹⁵⁷ *R v J.A.* (2011) SCC 28.

¹⁵⁸ *R v Welch* (1995) 25 OR (3d) 665 still stands as authority for the prosecution of consensual sadomasochism bringing actual bodily harm in the jurisdiction of Canada.

¹⁵⁹ See *Regina V Emmett* [1999] EWCA Crim 1710.

¹⁶⁰ *Ibid.*

¹⁶¹ Section 273.1 (1) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

¹⁶² *Ibid.*

change their mind and revoke such consent to the sexual activity before, or at the time of the act in focus.¹⁶³ Furthermore, the “sexual activity in question”, as codified within the statute,¹⁶⁴ must be known between the partners in terms of its specific outcome, nature, and action.

Section 273.1 (2)(b) propels the voluntary,¹⁶⁵ conscious element of consenting to sexual activity by stating that no consent shall be obtained where “the complainant is incapable of consenting to the activity.”¹⁶⁶ This provision is instilled to safeguard the sexual sanctity of those who lack the mental appreciation in giving actual consent. Where an individual has been induced into a state of unconsciousness, their active mind ceases to exist. The unconscious person’s consent regarding the activities perfumed upon them will fall into the realm of incapacity in consenting to such activities.

Consent at this stage of the inquiry is cemented as an express and cognitive form,¹⁶⁷ given by a person with sufficient legal capacity in relation to the actual sexual activity, as prescribed by the Canadian criminal law. This reasoning derives by virtue of the aforementioned provisions of the Code.¹⁶⁸ Implied consent, or advanced consent, is not accounted for within the criminal law jurisprudence of sexual assault within Canada. This is also absent from any applicable statute, proving that affirmative consent is the minimum threshold of acceptance within this developing defence.¹⁶⁹

The complainant (K.D) was a long time sexual partner of the accused (J.A) and the couple had a two-year-old son.¹⁷⁰ The complainant and the accused had engaged in consensual sadomasochism within their sexual tenure, dabbling in the realm of erotic asphyxiation. The complainant had noted she understood that the inherent danger of the erotic asphyxiation might strip her of her consciousness within the activity.¹⁷¹ The practice of the sexual partners had rendered the complainant unconscious for what was believed to be less than three minutes.¹⁷²

¹⁶³ This phenomenon is also in tune with the concept of autonomy, which will be explored in Chapter 4 of this dissertation.

¹⁶⁴ Section 273.1 (1) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

¹⁶⁵ Ibid section 273.1 (2)(b).

¹⁶⁶ Ibid.

¹⁶⁷ Ibid. section 273.1 (2)(e) states: “[T]he complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity”. This entrenches an express form of voluntary rescindment of consent by an individual to a sexual activity.

¹⁶⁸ Ibid.

¹⁶⁹ In *R v Ewanchuk* [1999] 1 S.C.R. 330 at para 31

¹⁷⁰ J Marcus “*R. v J.A.: An Uncomfortable Truth.*” *The Court.ca* (16 June 2011), Retrieved from <http://www.thecourt.ca/r-v-j-a-an-uncomfortable-truth/>. (Accessed on May 20, 2018).

¹⁷¹ D. Stuart *Canadian Criminal Law* 7 ed (2014) 620.

¹⁷² *R v J.A.* (2011) SCC 28 at para. 5.

The accused inserted a dildo into the anus of the complainant and then bound her hands together.¹⁷³ All of these acts were performed whilst the complainant drifted in a state of unconsciousness.

The complainant had reported to the police of the assault she had suffered by the conduct of the accused. Within her video-recorded statement,¹⁷⁴ she stated that she did not give her consent for the sexual activity that was performed upon her whilst she dwelled within the unconscious state. However, at the dawn of the trial, the complainant had abandoned her testimony against the accused, stating that she had only made such a statement as the accused had threatened her with fighting for the custody of their child.¹⁷⁵

The reasoning of the court in assessing the alleged consensual sexual activity performed upon an unconscious person takes centre stage. The court in *J.A* spearheads a fissure within itself between the majority and minority. Both wings of the court had interpreted the elements in differing lights.¹⁷⁶ The majority, under McLachlin C.J., clung to the interpretation of the Code regarding sections that instil the voluntary element of giving and rescinding consent to sexual activity at will. The unconscious state had reduced the complainant into a position of incapacity, unaware of her surroundings and unable to comprehend the sexual activity that was befalling her. The complainant lacked the active mind that is expressly provided for by the Code¹⁷⁷ in giving consent to sexual activities and to withdraw such consent. Thus, the sexual activities that occurred whilst the complainant endured the state of unconsciousness could not be sustained by prior consent to such practices.

*'In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it is inappropriate for this Court to carve out exceptions when they undermine Parliament's choice. In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.'*¹⁷⁸

This viewpoint of the majority stands as a steadfast approach regarding the affinity of the court toward the statute drafted by parliament in outlining consent to sexual activity¹⁷⁹. The majority

¹⁷³ Ibid at para. 6.

¹⁷⁴ J. Koshan "Consciousness and Consent in Sexual Assault Cases" *ABlawg.ca* (17 June 2011), Retrieved from <https://ablawg.ca/2011/06/17/consciousness-and-consent-in-sexual-assault-cases/>. (Accessed on 20 May, 2018).

¹⁷⁵ See facts of *R v J.A.* (2011) SCC 28.

¹⁷⁶ Ibid.

¹⁷⁷ Section 273.1 (2)(e) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

¹⁷⁸ Citing McLachlin CJ in *R v J.A.* (2011) SCC 28 at para. 65.

¹⁷⁹ Criminal Code of Canada, R.S.C. 1985 C. 46.

could not depart from the reach of the statute, nor was it the intention of the court to create an exemption to the prescribed outline of consensual sexual activity. To the majority, a prosecution of sexual assault against the accused was necessary based on the deviation of the accused's conduct from the statute.

The minority, following the dissent of Fish J, saw the case along the converse of this spectrum of judicial intrigue. The minority drew their dissent upon the facts, and not on whether an unconscious person may validly consent to sexual activity. The minority felt that it should be a question of whether a conscious person can agree in advance to engage in sexual activity whilst they inhabit an unconscious state.¹⁸⁰ The focus of this dissent is to give credence to yet another emerging factor within this developing timeline, being that of individual human autonomy.

The Supreme Court of Canada noted, via the minority, that the law seeks to promote the sexual autonomy of women and not make decisions for them, for the advanced consent by the woman (K.D) is a factor of her autonomy.¹⁸¹ The minority accepted that under section 273.1 (2)(b),¹⁸² the complainant meets the unconscious element dictated within the ambit of the provision. However, the minority was of the opinion that the consent given whilst the complainant was conscious was valid in relation to the acts she intended to engage in, even if debilitated in her unconscious state.¹⁸³ The minority further assessed that the complainant was aware of the sexual activity in the form of erotic asphyxiation and had consented before entering a state of unconsciousness.¹⁸⁴

*'I agree that consent will be vitiated where the contemplated sexual activity involves a degree of bodily harm or risk of fatal injury that cannot be condoned under the common law, or on grounds of public policy. Asphyxiation to the point of unconsciousness may well rise to that level, but the contours of this limitation on consent have not been addressed by the parties. Nor has the matter been previously considered by the Court. For procedural reasons as well, the issue of bodily harm must be left for another day.'*¹⁸⁵

Although mentioned by the minority, the spotlight upon sadomasochism's prevalence within the barebones of *J.A.* remains unexplored.¹⁸⁶ The omission of the inquiry regarding the practice

¹⁸⁰ *R v J.A.* (2011) SCC 28 at para. 80.

¹⁸¹ *Ibid* at para 72.

¹⁸² Section 273.1 (2)(b) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

¹⁸³ *R v J.A.* (2011) SCC 2 *supra* at para. 104.

¹⁸⁴ *Ibid* at para 112.

¹⁸⁵ Citing Fish J in *R v J.A.* *supra* at para 75.

¹⁸⁶ *Ibid*.

of sadomasochism, and asphyxiation, in particular,¹⁸⁷ could have yielded a clearer understanding as to the Canadian law's acceptance of consensual sadomasochism. The exploration of the sexual act of sadomasochism, in the form of asphyxiation that causes actual bodily harm, would have been a substantial leap for Canadian criminal law jurisprudence regarding acts of this nature, their legal ambivalence and attempted legal interpretation.

The majority of the court debunked the confusion of advanced consent to sexual activity before a consenting individual enters an unconscious state. The Supreme Court could not allow the recognition of advanced consent to sexual activity where an individual is rendered unconscious; as the ability to rescind such consent is not available for one who inhabits such a state.¹⁸⁸ This is unlike medical procedures under anaesthetic, where there is a social utility and acceptance for the procedure, which brings actual harm upon the patient. The reasoning regarding the judgement of the court is derived from the lack of capacity of a complainant to appreciate the nature of the acts that befall them during their unconscious state. This is observed in stark isolation, for the possibility of the extension of the sexual activity performed could go beyond the envisioned consent of the unconscious individual.

An outlandish debate occurred where the court noted that there are instances where a partner kisses their sleeping partner or touches them with the express consent of that partner before they enter a state of slumber.¹⁸⁹ Even though one partner is asleep, inhabiting a state of 'unconsciousness', such an act cannot be viewed in the same eye of scrutiny as the case in question. To the court, this interpretation should further understand that consent itself should not strive to criminalise such innocent and normative behaviour between partners. As alluded to by the court, the act of sadomasochism practised in erotic asphyxiation is not in accord with such common behaviour between sexual partners.

The importance of the judgement of *J.A* within this judicial timeline is the prospective reach of the principles forged by the court to future sadomasochistic cases that involve the unconsciousness of a partner. The practice of sadomasochism occurring in asphyxiation is prevalent and hazardous, as noted in *Emmett*.¹⁹⁰ Where a case involving asphyxiation occurs, and an individual had consented to sadomasochistic activities to be performed whilst they

¹⁸⁷ See *Regina v Emmett* [1999] EWCA Crim 1710, involving the actual bodily harm arising from practices of sadomasochism, by means of asphyxiation.

¹⁸⁸ As accounted for within the Criminal Code of Canada, R.S.C. 1985 C. 46.

¹⁸⁹ *R v J.A.* (2011) SCC 28 at para 74.

¹⁹⁰ *Regina v Emmett* [1999] EWCA Crim 1710.

inhabit an unconscious state, a court that follows the judgement of *J.A* would have sufficient reason to prosecute such practice on the crime of sexual assault. This, however, must be drawn from the assessment of the nature of the harm caused and whether such had caused actual bodily harm. The prospect of the validity of advanced consent to sadomasochism proves remote and unrealistic, based on the inherent risk of the sexual practice.¹⁹¹

2.2.10) 2013: *R v Lock at Ipswich Court* (Judgement on 22nd January 2013) – England

Amongst the more recent cases arising from the jurisdictions of Canada and England regarding alleged consensual sadomasochism is that of *R v Lock*.¹⁹² This case, though not as extensively critiqued as *Brown*,¹⁹³ lends a contemporary legal viewpoint on consensual harm between adults.

A consensual agreement, along with a written contract, existed between the participants with Mr Lock assuming the role of a dominant, and a female participant ('Ms X') assuming the role of the submissive 'slave'.¹⁹⁴ The agreement between the parties expressed an emulation of a domination scene from the popularised fictional piece, '*Fifty Shades of Grey*'.¹⁹⁵

Ms X, to safeguard her anonymity, had consented to be tied to the floor and whipped upon her buttocks by Mr Lock and subsequently suffered bruising.¹⁹⁶ The couple had agreed that the safe-word, 'red', should be used by Ms X if she felt that the practice became unbearable, signalling Mr Lock to cease.¹⁹⁷ Ms X did not use the agreed safe-word and after the activity, she had sued Mr Lock for damages caused by the injury of the alleged assault. Ms X's testimony is noteworthy, as she stated that she knew she would be whipped in bondage, however, she did not anticipate Mr Lock to unleash such a force upon her.¹⁹⁸

¹⁹¹ Stuart *Canadian Criminal Law* (2014) 621.

¹⁹² *R v Lock at Ipswich Crown Court* (Judgement on 22nd January 2013).

¹⁹³ *R v Brown* [1994] 1 AC 212.

¹⁹⁴ Z. Akhtar 'Sado masochism and consent to harm: Are the courts under undue pressure to overturn *R v Brown*?' (2015) 4 *Westminster Law Review*. Retrieved from <http://www.westminsterlawreview.org/Volume4/Issue1/wlr32.php>.

¹⁹⁵ James *Fifty Shades of Grey* (2012).

¹⁹⁶ Akhtar 'Sado masochism and consent to harm: Are the courts under undue pressure to overturn *R v Brown*?' (2015) 4 *Westminster Law Review*.

¹⁹⁷ British Broadcasting Corporation "Fifty Shades' Sex-Session Assault Accused Cleared" (22 January 2013), Retrieved from <http://www.bbc.com/news/uk-england-suffolk-21145816>. (Accessed 22 May 2018).

¹⁹⁸ See Akhtar op cit note 194.

The state charged Mr Lock under section 47 of the Offences Against the Person Act,¹⁹⁹ seeing the charge of assault brought for the commission of actual bodily harm. It is evident that the State's inquiry regarding the possible prosecution of sadomasochism had not shifted from the derivative of the Act's provision, being the materialisation of actual bodily harm.²⁰⁰ However, the pertinence of this consideration is the developing viewpoint of public policy concerning consensual sadomasochism.²⁰¹ It should be noted that public policy alone is unlikely to serve as the definitive factor of exempting a prosecution, or limiting the criminality of an act; however, such may rightly serve in mitigating such.

The inquiry of the Ipswich Court sought to determine the validity of the consent given by Ms X to such a physical practice. Upon an inspection of the case in point, the Court attempted to determine whether consent could serve as a defence for Mr Lock concerning the actual bodily harm he had caused. The court, navigating through the straits of consent as a defence to the harm incurred, gravitated toward surfacing Mr Lock's criminality in relation to the sadomasochistic activities that were practised.²⁰² Consensual activity involving bondage and domination in the past would have been met with swift punishment, as was explored in the case of *R v Brown* where the materialisation of actual bodily harm was inflicted upon a participant.²⁰³ Consent as a defence to actual bodily harm caused by a defendant becomes irrelevant, for the harm which is practiced is viewed as inherently unlawful.²⁰⁴

Even though he was charged by the Court, Mr Lock was acquitted from the charge of assault arising in actual bodily harm upon the facts of the matter, as the positive actions of Ms X confirmed her intention to partake in the sadomasochistic activity.²⁰⁵ In addition, the discussion preceding the consensual harm had highlighted the nature of the intended sadomasochistic encounter and established a shared desire in sadomasochistic affiliation between the partners.

In commentary of this relatively recent judgement, it is important to consider the unique relationship between Mr Lock and Ms X. The dynamic between the partners was cemented by the alleged influence of '*Fifty Shades of Grey*', being the foundation of sadomasochistic exposure to the public at large. Furthermore, in contrast to *Brown*, which renders consent to

¹⁹⁹ Section 47 of the Offences Against the Person Act 1861.

²⁰⁰ Ibid.

²⁰¹ British Broadcasting Corporation 'Fifty Shades' Sex-Session Assault Accused Cleared' op cit note 197.

²⁰² L. Draper 'R v Brown - 20 years on' *The Student Lawyer*, Retrieved from <http://thestudentlawyer.com/2013/03/21/r-v-brown-20-years-on/>. (Accessed on 23 May 2018).

²⁰³ *R v Brown* [1994] 1 AC 212.

²⁰⁴ Ibid.

²⁰⁵ British Broadcasting Corporation 'Fifty Shades' Sex-Session Assault Accused Cleared' op cit note 197.

sexual violence as an irrelevant defence for an accused, the court considered the positive actions of participation of Ms X preceding her bruising by whipping. Ms X had acquired a tattoo in support of her sadomasochistic relationship with Mr Lock, reading as “property of Steven Lock” above her private region. This is yet another factor of observation as to positive act preceding the sadomasochistic encounter that affirms the consent to bodily harm by Ms X.

It must be noted that the court did not emancipate the practiced consensual sadomasochism into a realm of accepted exemptions regarding the materialisation of actual bodily harm in such practices. It appears that the court when acquitting Mr Lock had interpreted the case on its own facts and merits. In *R v Brown*,²⁰⁶ the defence of consent itself could not shake the court’s tolerance in condoning consensual sadomasochism where actual bodily harm had materialised. In *Lock*,²⁰⁷ actual bodily harm was practiced, yet Mr Lock was acquitted based on sufficient doubt observed by the jury regarding his guilt to cement a conviction. The shared understanding of the participants, their positive actions of prior agreement and the shared desire of deriving pleasure from the practice were accessory considerations to the court’s inquiry.

It is submitted that the question that lingers regarding the analysis of the practice is ‘at what level of intensity shall actual bodily harm, caused by consensual sadomasochism, be tolerated by a court?’ The desire to unearth this judicial anomaly within our contemporary age lingers in grey hues of its own within the legal spheres of England and Canada. However, there exists submissions of legal literature within these jurisdictions that impliedly strive to illuminate the current question. If such an act of consensual sadomasochism had occurred in the same vigour on par with that of *Emmett*,²⁰⁸ perhaps the court may have interpreted the validity of the injured partner’s consent in a different light. However, the judgement of *Lock* itself is a testament to a court’s interpretation of consent within activities that bring consensual and an understanding of the nature of the facts therein.²⁰⁹

2.3 The South African Viewpoint Regarding the Defence of Consent to Bodily Harm

²⁰⁶ *R v Brown* [1994] 1 AC 212.

²⁰⁷ *R v Lock at Ipswich Crown Court* (Judgement on 22nd January 2013).

²⁰⁸ *Regina v Emmett* [1999] EWCA Crim 1710.

²⁰⁹ *R v Lock supra*.

The South African perspective of the legal defence of consent is a focus of consideration regarding the interpretation of consensual bodily harm. In most instances of human interaction, the law does not endorse consensual violence to be inflicted between individuals.²¹⁰ Consensual sadomasochism, throughout the subsistence of this chapter, has derived itself from the developments of the international perspectives of Canada and England respectively. What appears to be the unanimous judicial interpretation of consensual sadomasochism is that consent alone to this practice is not enough to sustain itself as a valid defence where actual bodily harm is practiced.

As noted earlier, consensual sadomasochism, or sadomasochism in general, has not yet emerged before the South African judiciary, nor is the definition of this physical act layered within South Africa's criminal law legislation.²¹¹ Reeling in the latter developments from the English and Canadian courts regarding consensual sadomasochism, the doctrine of public policy emerges within the predominantly rigid prosecution of such acts by English and Canadian courts.²¹² The attempt in commenting upon the possible South African perspective, regarding the envisioned defence of consent to sadomasochism that brings varying degrees of bodily harm, is an incentive for exploration and assessment in our pluralistic society.

The defence of consent within South African criminal law may yield a favourable outcome to an accused who has committed an unlawful act; exempting their alleged criminal behaviour upon a warranted justification ground.²¹³ However, as shared by the viewpoints of England and Canada, South African law will not allow the defence of consent to sustain itself where the harm that is caused is beyond a permitted general limit.²¹⁴ A limit of consent's reach must be explored in relation to the act in question along with the nature of the harm inflicted. This delves into vast networks of investigation and the interpretation of legal principle, taking into consideration the materialisation of the harm from the consensual practice, as well as the legal recognition of the act itself within our legal system.

²¹⁰ "The Player and The Law" as cited by E. Viljoen "The Legal Implications of Rugby Injuries" (Masters Thesis, University of Port Elizabeth, 2003) 41.

²¹¹ The Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 of South Africa.

²¹² *R v Lock at Ipswich Crown Court* (Judgement on 22nd January 2013).

²¹³ Burchell *Principles of Criminal Law* (2013) 204.

²¹⁴ *Ibid* 205.

2.3.1 The *Volenti Non Fit Iniuria* Doctrine in South African Law

Consent and its ambit as a legal defence in South African criminal law is subject to the conscious will of an individual who gives their consent to a particular act.²¹⁵ The common law *volenti non fit iniuria* doctrine serves as a candid test for the defence of consent to bodily harm within the South African legal system.²¹⁶ Tshiki J, in the case of *Plumridge v Road Accident Fund*,²¹⁷ elaborated upon the *volenti non fit iniuria* doctrine in the following stead:

*“If one has regard to the interpretation, particularly the translation to English of the maxim in the South African context, anyone who voluntarily assumes the risk cannot later be held to complain if the assumed risk results in harm occurring, therefore, the defence of voluntary assumption of risk should be upheld.”*²¹⁸

The *volenti non fit iniuria* doctrine sets the stage for consent to bodily harm by participants to a physical practice, tied to the notion of a voluntary assumption of risk by the complainant’s consent. This doctrine of the ‘justification of harm’ runs in a stream of two separate niches of consensual injury that are acceptable within South African law. Both serve as pivotal starting points and offer conclusive considerations in assessing consensual sadomasochism, if the practice finds itself before the judiciary.

Firstly, one may consent to a specified injury, such as a specific surgical procedure that brings guaranteed bodily harm.²¹⁹ Informed consent may be raised a defence where the alleged victim was aware of the risks involved within the specific physical practice.²²⁰ The patient who provides their informed consent to the surgery is aware of the precise injury arising from this avenue of harm, and so exempts the liability of the doctor.²²¹ Any deviation, or contradicting harm, caused by the doctor from the consented injury shall be considered as a breach of that patient’s consent.²²²

²¹⁵ Ibid.

²¹⁶ In its simplistic form, the doctrine translates as, “he who consents cannot be injured”. See *Roux v Hattingh* (636/11) [2012] ZASCA132 (27 September 2012) at para 41.

²¹⁷ Citing Tshiki J in *Plumridge v Road Accident Fund* (2656/2009) [2012] ZACPEHC 48 (7 August 2012) at para 11.

²¹⁸ Ibid.

²¹⁹ A therapeutic surgical procedure, such as a tonsil operation, brings a specific injury upon a patient’s body. Such is considered as a legally sanctioned form of actual bodily harm, so long as the harm is within the general scope of the procedure.

²²⁰ Stuart *Canadian Criminal Law* (2014) 615.

²²¹ A. Dhali ‘Informed consent’ (2008) 1 *South African Journal of Bioethics and the Law* 28.

²²² N. Sawicki ‘Informed consent as societal stewardship’ (2017) 45 *Journal of Law, Medicine & Ethics* 42.

Secondly, one may consent to the assumption of the risk that an injury may occur.²²³ This is common in certain professional sports that traverse the borders of imminent harm, such as rugby or boxing. A rugby player, for instance, voluntarily assumes the risk of an injury occurring within the regular scope of a rugby game the moment he, or she, commences with the activity.²²⁴ An apt description of a rugby injury may be perceived as:

“[A]ny physical complaint, which was caused by a transfer of energy that exceeded the body's ability to maintain its structural and/or functional integrity and that was sustained by a player during a rugby match or rugby training, irrespective of the need for medical attention or time-loss from rugby activities.”²²⁵

The risk of injury could occur in the form of a sprained shoulder or a broken nose – or any other injury that is a reasonable risk to the human body within the regular practice of the game.²²⁶ The essential facet of this niche of the doctrine is that the harm of the injury is not guaranteed to occur, merely there is a risk of such harm materialising, which is accepted by participants of the game.²²⁷ However, where the injury is outside the general scope of the activity consented to; the application of the doctrine will cease to hold any credence as a defence for the harbinger-of-the-harm.

This second niche of the doctrine is difficult when applied to consensual sadomasochism, for the assessment of a South African court would be perplexed in attempting to define the validity of the act before it can apply any form of legal interpretation in assessing the inherent risks of the practice. Furthermore, every practice of sadomasochism is exclusive to the consenting partners within their personal and private sexual panoply.²²⁸ This shall make the creation of a general assessment difficult within the developing South African criminal jurisprudence of the practice, as each sadomasochistic encounter shall generally not occur in the same distinction.

A couple who practices a specific form of harm shall differ in the harm desired by another couple to the practice of sadomasochism,²²⁹ based on the intended nature of their unique

²²³ *Roux v Hattingh* (636/11) [2012] ZASCA132 (27 September 2012) at para 41.

²²⁴ *Ibid.*

²²⁵ Fuller et al. as cited by A Barrett, "The Epidemiology of Hostel Rugby Injuries at Stellenbosch University" (Masters thesis, University of Stellenbosch, 2015), 10.

²²⁶ See 'The Rugby Injury Timebomb' in Viljoen "The Legal Implications of Rugby Injuries," 19.

²²⁷ *Ibid.*

²²⁸ J. Fedoroff 'Sadism, Sadomasochism, Sex, and violence' (2008) 53 *The Canadian Journal of Psychiatry* 638.

²²⁹ Erotic asphyxiation brings with it a far more detrimental harm and greater risk to the human body as opposed to erotic whipping. The punishment of an individual who has reduced their partner into a state of unconsciousness cannot be assessed in the same avenue of judicial scrutiny as one who has caused injury in the form of bruising.

agreements.²³⁰ This is substantially inconsistent by comparison to the game of rugby, where there is a consistent application of universal and unanimous rules that are binding upon every rugby match. Lastly, the concept of the public policy is no stranger to this segment of the doctrine.²³¹ In a rugby game, the public will not view certain conduct as unlawful, even if a serious injury has occurred, so long as the harbinger-of-the-harm's conduct was not in contravention with the accepted limits and rules of the game. Sadomasochism, even if consensual in nature, shall prove odious to assess in the possible existence of 'harm that may occur', for harm is guaranteed within the inherent nature of the practice.

A court of South Africa, when interpreting the elevated defence of consensual harm caused within sadomasochism, will find a greater interpretative perspective within the first niche of the doctrine. Just as medical surgery brings with it a specific and guaranteed bodily harm, so too is the harm within a consensual sadomasochistic relationship entrenched. At the advent stage, the desired harm is negotiated between the partners when assuming their roles to the 'scene'.²³² The first perspective of the doctrine operates in a complementary correlation with the concept of consensual sadomasochism; where the activity is performed willingly, unforced and between consenting adult partners for sexual gratification. The doctrine will align itself as a justification to the harm caused within a consensual sadomasochistic relationship if the following are satisfied, as laid out in the assessment of the application of the doctrine in *Seti v South African Rail Commuter Corporation Ltd*.²³³ (The applicability of the *volenti non fit iniuria* doctrine is adapted from the aforementioned case to reflect the possible requirements for a valid defence of consent to a sadomasochistic encounter):

- (a) "The injured submissive was aware of the harm that will be imposed by the dominant, with complete appreciation and the full knowledge of the intensity of the harm and its scope. This can be juxtaposed to the level of informed consent that exists within medical operations between patients and doctors."²³⁴
- (b) The submissive must show a holistic appreciation to the harm that is administered by the dominant. Thus, mere knowledge of the envisioned harm, and the possible

²³⁰ R. Weierstall and G. Giebel 'The sadomasochism checklist: A tool for the assessment of sadomasochistic behavior' (2017) 46 *Archives of Sexual Behavior* 735.

²³¹ *Roux v Hattingh* (636/11) [2012] ZASCA132 (27 September 2012) at para. 28.

²³² L. Chancer *Sadomasochism in Everyday Life: The Dynamics of Power and Powerlessness* (1992), 3.

²³³ Boberg as cited in *Seti v South African Rail Commuter Corporation Ltd* (10026/2009) [2013] ZAWCHC 109 (8 August 2013) at para 23.

²³⁴ Stuart *Canadian Criminal Law* (2014) 615 - 616.

assumption of the risk of its materialisation is inadequate to spur the sustainability of the doctrine as a defence for the dominant.

- (c) The harm that is consented to by the submissive infringes their bodily rights of safety, security, and protection; as safeguarded by section 12 of the Constitution.²³⁵ Thus, the submissive must appreciate that their consent to the bodily harm shall impliedly waive and limit their Constitutional rights. However, this subjective regulation of inherent Constitutional rights by the submissive is not absolute, as the bodily harm itself would be assessed by the presiding court.
- (d) The dominant's exertion of physical force in administering the harm must walk in line with the limits created by the submissive's consent.²³⁶ Where the dominant's conduct is converse to the consent of the submissive, regarding the envisioned bodily harm, the doctrine cannot be raised as a defence.
- (e) The submissive's consent must unravel into all avenues of potential harm that may arise from the conduct of the dominant. In addition, the agreement of safe-words to cease the sadomasochistic practice should be agreed upon in negotiations prior to the consensual sadomasochism. These safeguards to the administration of bodily harm should be known by both the dominant and the submissive respectively.
- (f) With the concept of informed consent blooming within the *volenti non fit iniuria* doctrine, consent by the submissive to bodily harm must be freely given, and the risk of the promised harm from the sadomasochism voluntarily assumed upon the submissive's participation.²³⁷ This, once again, propels the prominence of the concept of autonomy within South Africa's stance regarding the *volenti non fit iniuria* doctrine's applicability as a defence of consent to bodily harm.
- (g) The act of consent to bodily harm is a unilateral act of the submissive,²³⁸ echoing the concept of real consent. Thus, consent to an injury, or the assumption that a harm may occur; must be subjectively foreseen and understood by the submissive when interpreting the envisioned harm to be administered by the dominant. Coupled with this perspective; a positive action by the submissive, expressing their intention to participate, must be followed in support of the envisioned harm. This will cement

²³⁵ Section 12 of The Constitution of the Republic of South Africa.

²³⁶ Sawicki 'Informed consent as societal stewardship' (2017).

²³⁷ Ahmed "Contributory Intent as a Defence Limiting or Excluding Delictual Liability" (2008).

²³⁸ J.M. Burchell and J. Milton *Principles of Criminal Law* 3 ed. (2005) 340, observe that sexual intercourse between a couple can occur by the unilateral act coined as the 'manifestation of will'. Sadomasochism is not only coupled with consent to a sexual act, but also the acquisition of consent to bodily harm.

the positive act of consent; however, such may not give legal validity to the act of sadomasochism. For the submissive to effectively initiate a legal act; such as the giving of consent to a particular activity, they must be imbued with legal capacity.

- (h) Where the dominant is negligent in their conduct, and a deviant harm arises from their actions, the doctrine cannot be raised as a defence. This is hinged upon the understanding that the submissive has not consented to the negligent harm caused.
- (i) Based on the unilateral concept of consent, revocation can be concluded at any time by the will of the submissive, in this instance, by virtue of a safe-word.²³⁹

The *volenti non fit iniuria* doctrine will hold itself as a prominent defence if a case of consensual sadomasochism is exposed before the South African judiciary on a criminal charge. Where a matter bringing variant degrees of bodily harm is brought before a South African court, it would be pertinent to first establish whether consent to bodily harm is permitted within the gaze of the law. The second inquiry of a court, in light of the *volenti non fit iniuria* doctrine, would then consult the severity of the consented harm upon the injured partner and, if at all, the extent such harm might have upon others who are not a party to the consensual activity.

2.3.2 Consent as a Defence to the Commission of Bodily Harm in South Africa

For consent to qualify as a defence in South African criminal jurisprudence, all of the following three requirements must be observed:

1. *The complainant's consent to the activity of the practice must be acknowledged, or be recognised, within the law as a possible defence.*²⁴⁰

The law of South Africa will hold consent to bodily harm as a potential defence if the act consented to by a complainant is recognised within the legal system as lawful.²⁴¹ This is problematic in forging the legality of consensual sexual violence, as legal literature encompassing this practice does yet not exist within the archives of South Africa. The criminal law, in turn, does not refer to the practice of sadomasochism in legislation or case law. The first requirement of a valid defence of consent appears to

²³⁹ Boberg as cited in *Seti v South African Rail Commuter Corporation Ltd* (10026/2009) [2013] ZAWCHC 109 (8 August 2013) at para 23.

²⁴⁰ Burchell *Principles of Criminal Law* (2013) 207.

²⁴¹ L. Vandervort 'Consent and the criminal law' (1990) 28 *Osgoode Hall Law Journal* 487.

fail within the looming plethora of consensual sadomasochism, based on the dearth of legal literature within South Africa in aiding the state in defining the practice.

The difficulty also arises based on the inherent nature of the consensual sexual practice itself, the causing of physical and psychological pain in the pursuit of sensual gratification.²⁴² Even if undefined within the South African legal nucleus, the law shall inevitably brand consensual sadomasochism as the administration of harm by one individual unto another, rather than perceiving it as a mutually gratuitous practice.²⁴³ Moreover, if the state is faced with a physically hazardous surfacing of consensual sadomasochism, its interpretation may be paralleled to that of a sexual assault, based on the intensity of the harm caused.²⁴⁴

A South African court, as resembled by the precursor international developments,²⁴⁵ may rightly deny the defence of consent raised for such an unestablished activity that endorses violence and bodily harm; even if the practice is consensual.²⁴⁶ This first requirement for a valid defence of consent in South African criminal law jurisprudence already starts upon an uneasy footing regarding the practice of consensual sadomasochism. In an allegation of rape,²⁴⁷ only the absence of consent by one individual to the sexual intercourse will bring forward the unlawfulness of the act itself. In contrast to the nature of the inquiry within a rape investigation, sadomasochism brings with it inherent violence and bodily harm, dependant on the level agreed upon between the consenting partners. Thus, sadomasochism, even if consensual in nature, will likely be interpreted as that of an assault based on the intrinsically material harm that is caused, bolstering the state's prerogative in restricting the practice of violent activities that bring harm within society.

²⁴² P. Cross and K. Matheson 'Understanding sadomasochism: An empirical examination of four perspectives' (2006) 50 *Journal of Homosexuality* 134.

²⁴³ National Coalition for Sexual Freedom "Consent and BDSM: The state of the law" (2010), Retrieved from <https://www.ncsfreedom.org/component/k2/item/580-consent-and-BDSM-the-state-of-the-law>. (Accesed on 1 June 2018).

²⁴⁴ D. Pitagora 'Consent vs. coercion: BDSM interactions highlight a fine but immutable line' (2013) 10 *The New School Psychology Bulletin* 28.

²⁴⁵ *R v Donovan* [1934] 2 KB 498.

²⁴⁶ See *Regina v Emmett* [1999] EWCA Crim 1710 which highlighted that even though the element of consent is established between participants, high-risk physical activities are contrary to public policy and the rights of safety that are safeguarded by the State.

²⁴⁷ Section 3 of South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines the crime of rape as "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

The element of normal medical treatment stands as an essential ember within the recognition of the defence of consent to bodily harm by this practice. A medical practitioner will be safeguarded from liability based on the ground of justification that the patient has expressed the requisite informed consent to proceed with surgery,²⁴⁸ and exhibits voluntary conduct in continuing with the procedure.²⁴⁹ The duty of the medical practitioner, being the harbinger-of-the-harm upon the potential patient, is to supply coherent information regarding the material risks and harm that may materialise from the procedure.²⁵⁰ The conveyed information bolsters patient autonomy and brings into focus the accountability of the medical practitioner where a deviation occurs from the entrenched information.²⁵¹ Lastly, the immensity of the harm caused, even if it is serious in its occurrence, shall exempt liability on a medical practitioner if the procedure follows along the straits of the reasonable behaviour of a medical professional. This proves that the recognition of certain harmful consensual practices by the state shall exempt liability, even in the occurrence of grievous bodily harm.

This is similar to the role of power exerted by a dominant over a submissive within a consensual sadomasochistic relationship. In a correctly performed sadomasochistic relationship, the partners negotiate their desired physical actions, agreeing on their respective roles. Partners also agree upon that which they wish to derive from the practice and the establishment of safe-words to offer a mechanism of restraint is adopted. In respect of the assessment of a sadomasochistic dynamic, a submissive within a sadomasochistic relationship must give informed consent to the harm desired, as explored earlier within the concept of the *volenti non fit iniuria* doctrine.

However, the absence of the State's recognition to this practice proves unfavourable in the safeguarding of a dominant who has acquired informed consent to bodily harm. The first requirement's validity to being kindled as a valid defence to consensual bodily harm proves ever remote.

²⁴⁸ See L. Henley 'Informed consent - a survey of doctors' practices in South Africa' (1995) 85 *SA Medical Journal*.

²⁴⁹ Burchell *Principles of Criminal Law* (2013) 218.

²⁵⁰ N. Messer 'Professional-patient relationships and informed consent' (2004) 80 *Postgraduate Medical Journal* 278.

²⁵¹ *Ibid* 278-80.

2. *For consent to succeed as a defence for an accused, the consent given by a complainant must also be real in its nature.*²⁵²

This too is a correlation of intrigue in the existence of consensual sadomasochism and its possible position of legal standing when overseen by South African courts. In the string of cases that have populated this timeline thus far, the majority of the participants to the sexual activities had given consent that was real. Even though participants to such sadomasochistic practices expressed the manifestation of real consent, this did not render the outcome, or the nature, of the consensual sadomasochistic relationships as lawful, based on the degree of the harm that was caused.²⁵³

Unlike the element of consent that is a requirement for a valid contract,²⁵⁴ consent in the criminal law to an activity that causes bodily harm must be given unilaterally by the recipient to said harm. Real consent may only be given by an individual who is able to appreciate the nature of the act in which they are consenting to; thus, any trace of a mental impediment (or corresponding limiting mental factor) shall not be in line with this definition.

Consent can be conveyed either expressly, or by an individual's conduct; falling into the realm of implied consent. The Criminal Law (Sexual Offences and Related Matters) Amendment Act explicitly provides for the concept of *real* consent regarding sexual penetration,²⁵⁵ bolstering the voluntariness of sexual practice itself and criminalising actions where one partner penetrates the other without the presence of their active consent.²⁵⁶

In reference to consensual sadomasochism, and if a submissive has evoked sufficient informed consent to the desired physical activity, the bodily harm caused by the consensual encounter can be viewed as satisfactory in terms of 'real consent'.²⁵⁷

²⁵² Burchell *Principles of Criminal Law* op cit note 6 at 222.

²⁵³ See Giles '*R v Brown*: Consensual harm and public interest' (1994) 101-09.

²⁵⁴ *Consensus ad idem* is the fundamental concept of consent within the law of *contract*. The lawful 'mutual agreement' between contractants is sufficient to satisfy this element.

²⁵⁵ Section 1(3) of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁵⁶ South African jurisprudence, just as the international legal sphere, proves to value and promote the principle of individual human autonomy.

²⁵⁷ See Dhali 'Informed Consent' (2008).

Dominance and submission are as much of a duality to the practice of sadomasochism as a moth is to a flame. This perception of an internal dynamic to real consent regarding sadomasochism may turn the second element for a valid defence on its head, upon legal inspection by a South African court. Where an individual inhabits a position of dominance over another, the submissive to the power dynamic may not evoke real consent in the activities practised - based on the intensity of the applied force. This is a difficult consideration to reveal a fruitful radiance of real consent by a submissive, when under the control of a dominant, within a sadomasochistic encounter. The following discussion attempts to sculpt a rear window within the vehicle of real consent's applicability in consensual sadomasochism:

Even if the submissive has evoked informed consent to the bodily harm, and expressed voluntary conduct to participate, the sheer force of the dominant within their sexual demographic may restrict the voluntary withdrawal of the given consent by the submissive.²⁵⁸ Such was the claim of 'Ms X' in the case of *R v Lock*;²⁵⁹ where she had expressed real consent to the sadomasochistic practice of whipping but received a far more grotesque and forceful harm than she had envisioned, based on the dominance exerted by Mr Lock.²⁶⁰ As noted by Burchell, there exists a tedious domain of murkiness between consent and 'mere submission' to an act.²⁶¹

Where a South African court is exposed to a set of facts that are similar to that of *R v Lock*, a submissive's consent to bodily injury within the sexual relationship must be explored in correspondence with the definition of real consent to bodily harm. The voluntary withdrawal of consent to the harm caused by the sadomasochistic practice is alluded to within the established practice of safe-words. Where a submissive utilises this mechanism, it proves that it is the intention of the submissive to withdraw from the practice. The nature of a safe-word can be described as:

²⁵⁸ Simester et al. *Simester and Sullivan's Criminal Law Theory and Doctrine* (2016) 788.

²⁵⁹ *R v Lock at Ipswich Crown Court* (Judgement on 22nd January 2013).

²⁶⁰ See Akhtar 'Sado Masochism and Consent to harm: Are the courts under undue pressure to overturn *R v Brown*?'

²⁶¹ Burchell *Principles of Criminal Law* (2013) 223.

*'[A]n agreed upon word, phrase, or signal that immediately overrides the power dynamic in play and indicates the desire to stop the BDSM act or interaction in progress.'*²⁶²

This safety mechanism serves as a bolstering factor of encouraging the voluntariness to the sexual practice by the submissive, and in turn, giving flight to the applicability of real consent. However, the dominance brought upon the submissive still remains a pertinent factor of consideration in curtailing the use of the safe-word, or the failure of the safe-word itself to restrict the dominant's behaviour. The safe words sanctity may not always be appreciated and respected by the dominant, for there are no other convincing factors that could prove to a South African court that the submissive's retraction of consent to bodily harm was truly given in its real form. Thus, the applicability of a safe-word in conveying real and effective consent to participate in the sadomasochistic activities may not always occur within the nature of this sexual practice.

Moreover, real consent within sadomasochism can be viewed as a possible two-tiered concept. Firstly, it will involve the consenting to a physical force of the informed sadomasochistic practice that shall bring a measure of harm. Secondly, and if such is desired by the partners, it relates to the mutual consent regarding the practice of sexual intercourse. What emerges from this is yet another factor of development that is necessary to explore by a South African court in dealing with such a legally shrouded practice. This shall probe the extent of a submissive's real consent to the entirety of the sexual practice itself. In turn, a court should attempt to examine the use and effectiveness of a safe-word, to not only cease the sadomasochistic activity but whether it may nullify the consent to sexual intercourse as well.

Real consent exists in a stark continuum within a consensual sadomasochistic relationship, as the example of the use of an agreed safe-word by the submissive shall express a voluntary rescindment of the practice and attempt to negate the physical aggression caused by the dominant. Where the voluntary abrogation of consent to

²⁶² Sagarin et al., as cited in Pitagora 'Consent vs. coercion: BDSM interactions highlight a fine but immutable line' 29.

bodily harm, in the form of sadomasochism, is not respected by the dominant; this will result in a non-consensual act of violence suffered by the submissive.²⁶³

‘There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent.’²⁶⁴

3. *A complainant who has the requisite capacity to consent to the activity in question is capable of expressing legally recognised consent.*

This last, yet fundamental notion of valid consent relates to the appreciation, by a complainant, to understand and accept the nature of the envisioned consensual harm. South Africa’s legislative forerunners regarding this cognitive element of appreciation by an accused are drawn from sections 77 and 78 of the Criminal Procedure Act.²⁶⁵ Just as the exemption of a court’s conviction upon an offender who cannot appreciate the wrongfulness of their criminal conduct, conversely exists the nullification of a complainant’s consent where one lacks the requisite legal capacity to appreciate the nature of the act that they are consenting to.

The South African criminal law jurisprudence is forged upon a stoic anvil regarding the recognition of a complainant’s conscious mind, operating in a manner that is capable of both approving and revoking consent to physical activities that may cause bodily harm. A complainant who is capable of evoking the aforementioned requirements radiates consent that will be legally recognised by a South African court and entrenching a possible defence for an accused to the bodily harm that was caused. However, where a complainant lacks this cognitive appreciation, impaired by either youthfulness, intoxication or a mental illness, the final requirement of valid consent to bodily harm shall not be satisfied.²⁶⁶ A South African court, if subjected to a matter concerning consensual sadomasochism in regard to the third element of this defence,

²⁶³ Ibid 32.

²⁶⁴ Citing Coleridge J in *Day* (1841) 9 C & P 722 at 724, as cited in Burchell *Principles of Criminal Law* (2013) 223.

²⁶⁵ Sections 77 and 78 of the Criminal Procedure Act No. 51 of 1977 highlight the mental incapacity of an accused to appreciate the the nature of the criminal proceedings and their criminal liability respectively. This weighs heavily on the viewpoint of mental capacity of an accused within South African criminal law.

²⁶⁶ Burchell *Principles of Criminal Law* (2013) 229-30.

will have sufficient general legal literature in the form of case law and legislation to cover the ambits of the exceptions to legal capacity.²⁶⁷

In retrospection of the *Lock* case, the criminal capacity of Mr Lock was established on part of the appreciation that he had in inflicting actual bodily harm. Even though his partner was aware of the nature of the consensual harm, Mr Lock still suffered prosecution. However, even with the establishment of the requisite forms of capacities of both participants, Mr Lock was acquitted as his partner was aware of the nature of the harm and her consent had sustained itself during the subsistence of the activity. This is an example of an overseas perspective regarding the establishment of the capacity to consent to harm and the acknowledgement of the criminal capacity of an accused. Such may allow for cognisance and similarity if a South African court were to find itself in a similar situation and to determine the outcome based on the facts of the specific matter.

The issue of an unconscious complainant is pertinent regarding the practice of consensual sadomasochism by asphyxiation, as was seen in the Canadian case of *R v J.A.*²⁶⁸ The criminal law will not recognise the consent of an unconscious person and any act committed upon a debilitated individual is deemed to be committed without their consent.²⁶⁹ The practice of erotic asphyxiation is an interesting parallel to the concluding element of the defence of consent. Asphyxiation may not always bring unconsciousness; however, the risk of a complainant inhabiting this state is heightened by such a practice.²⁷⁰ This consideration must be drawn by a court to avoid the ambivalence expressed by the Supreme Court of Canada when faced with an unconscious partner to consensual sadomasochism, and the actions that follow when they inhabit this state.²⁷¹

²⁶⁷ Youthfulness, intoxication, unconsciousness, and the existence of a mental defect or illness have been developed and judicially critiqued by South African courts within the criminal sphere. (See the *Child Justice Act* 78 of 2008; Section 1 of the Criminal Law Amendment Act 1 of 1998; Section 8 of the Mental Health Care Act 17 of 2002).

²⁶⁸ See *R v J.A.* 2011 SCC 28.

²⁶⁹ Burchell *Principles of Criminal Law* (2013) 230.

²⁷⁰ K. Busby 'Every breath you take: Erotic asphyxiation, vengeful wives and other enduring myths in spousal sexual assault prosecutions' (2012) 24 *Canadian Journal of Women and the Law* 328.

²⁷¹ *R v J.* 2011 SCC 28 at para 66.

The concept of advanced consent proves to be problematic within this node of the defence of consent to bodily harm where an individual is rendered unconscious. If sexual intercourse occurs whilst a complainant is unconscious, the validity of advanced consent will not hold any reliance as a defence within South African criminal law to such a physical act. This is because the complainant is unable to appreciate the nature of the risk of the actions inflicted upon them, based on their incapacity to consent to the act in focus.²⁷²

The South African legislative framework regarding such sexual practices that occur upon an unconscious individual would define these interactions along the lines of rape, as expressed in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.²⁷³ For actions that do not involve the sexual penetration of the unconscious partner, but manifesting itself in physical inflictions that bring bodily harm or serious bodily harm, the accused shall likely be liable for the varied crime of assault.

2.3.3 '*I Hurt Myself Today*' – If Consensual Sadomasochism Is Found Before A South African Court

To interpret consensual sadomasochism from a jurisprudential perspective within South African law, the extent of the state's acceptance as to the intensity of the harm caused must be illuminated. The understanding that each sadomasochistic activity, practised between consenting adults, is uniquely tempered by the sexual desire of the partners is already a growing rumination of courts from England and Canada. Thus, to avoid rewording that which has already been explored earlier, and to sculpt the possible South African perspective in-line with the aforementioned jurisdiction's viewpoints, relevant varying degrees of consensual bodily harm must be considered.²⁷⁴

The consideration of *Donovan* loomed in a period of prosecution for those that fell within the English law's precedent;²⁷⁵ being the causing of harm or injury which is 'more than transient

²⁷² E. Craig 'Capacity to consent to sexual risk' (2014) 17 *New Criminal Law Review* 133.

²⁷³ Section 3 of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁷⁴ "Capacity to consent to sexual risk," 119.

²⁷⁵ *R v Donovan* [1934] 2 KB 498.

and trifling'.²⁷⁶ However, in light of submissions by courts that have followed the contemporary, yet vague, notion of public policy; this judgement proves to create a myopic and dwarf-like standard for the interpretation of a consensual harm or injury; as such is already outlined by the *volenti non fit iniuria* doctrine in South Africa.²⁷⁷ The aged and out-dated precedent of *Donovan* shall not strengthen the South African perspective regarding the legality of harm caused by consensual sadomasochism, as it sets the bar of consent to bodily harm at a minimal threshold.²⁷⁸ The vagueness of this judgement by the English court, even if an injury is impermanent, appears to be disjunctive when juxtaposed to other state-sanctioned practices that result in the occurrence of grievous, or serious, bodily harm in both the public and private sphere.

The consensual act of tattooing administers a sufficient amount of bodily harm, occurring in the bruising of the human dermis, and the release of blood is not an abnormal feature of this practice.²⁷⁹ The South African criminal law jurisprudence regarding this avenue of consensual harm allows for a concord in the exemption of liability for the tattoo artist, based on the inherent harm of this lawful activity. It seems absurd to liken this activity to the prosecution of an assault arising in serious bodily harm, or grievous bodily harm, as such would open the floodgates of the courts to disgruntled customers who had suffered harm or injury when acquiring their tattoo.²⁸⁰ The consent to such an injurious physical practice is deemed to be legal, so long as the requirements of the *volenti non fit iniuria* doctrine are satisfied between the complainant and the accused.²⁸¹

South African law, unlike England and Canada, does not expressly outline 'actual bodily harm' – which serves as the fundamental point of consideration within the array of judgements regarding consensual bodily harm. However, the current criminal law of the country does outline an assault occasioning in *common assault* and *assault with intention to do grievous bodily harm*. The latter of the varying degrees of an assault could encompass the categorisation

²⁷⁶ S. Bielefeld 'The culture of consent and traditional punishments under customary law' (2003) 7 *Southern Cross University Law Review* 144.

²⁷⁷ *Roux v Hattingh* (636/11) [2012] ZASCA132 (27 September 2012) at para 28.

²⁷⁸ *R v Donovan* [1934] 2 KB 498.

²⁷⁹ A. Messahel and B. Musgrove 'Infective complications of tattooing and skin piercing' (2009) 2 *Journal of Infection and Public Health* 11.

²⁸⁰ As noted by Burchell *Principles of Criminal Law* (2013) 215.

²⁸¹ *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) 779.

of the harm from varied sadomasochistic practices,²⁸² as mentioned by the courts of England and Canada when interpreting consensual harm. The mere causing of bodily harm alone from a consensual sexual encounter appears to wither within the current methodology of South African criminal law if an act of consensual sadomasochism finds itself before a court. The *volenti non fit iniuria* doctrine chronicles the principles of autonomy and public policy as being sufficient to sway a South African court's perspective regarding the legality of this physical practice, based on the considerations of permitted bodily harm.²⁸³ Grievous bodily harm may be likened to the reach of actual bodily harm in the creation of a limit to the harm caused from a consensual sadomasochistic relationship if falling into the vicissitudes of a South African court.²⁸⁴

Therefore, a standard of assessment as to the commission of the varying forms of bodily harm by consensual sadomasochism cannot exist where the act itself is unclassified. If a South African court affords consensual sadomasochism the recognition of a sexual act of expression, rather than an assault, perhaps categories of accepted limits to bodily harm may be established. The nature of the consensual harm exists as one of the many building blocks of an informed decision by a court in considering the seriousness of the practice as a whole. A consensual relationship may exist as the cornerstone for an autonomous sadomasochistic activity that brings physical injury upon the submissive;²⁸⁵ however, such may not necessarily be deemed as lawful when interpreting the degree of harm that is caused.²⁸⁶

²⁸² See the case of *S v Ngubeni* (A459/2008) [2008] ZAGPHC 178 (17 June 2008) at para 25, where the court considers both the crime of grievous bodily harm and the element of intention on the part of the accused in administering such serious bodily injury upon a complainant.

²⁸³ *Seti v South African Rail Commuter Corporation Ltd* (10026/2009) [2013] ZAWCHC 109 (8 August 2013) at para 23.

²⁸⁴ See section 265 (2) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

²⁸⁵ S.R. Schmeiser 'Forces of consent' (2004) 32 *Studies in Law, Politics and Society* 3 - 38, available at SSRN: <https://ssrn.com/abstract=440660> (Accessed 13 June 2018).

²⁸⁶ The English case of *Regina V Emmett* [1999] Ewca Crim 1710 once again shines on as a noteworthy submission as to the disregard of a consensual sadomasochistic relationship that brings actual bodily harm. The harm caused by the infliction of asphyxiation and burning of the submissive proved to materialise in actual bodily harm, and that which resulted as a serious injury within the perception of the ever-developing concept of public policy. Where a similar injury is caused from a sadomasochistic relationship that is practiced within South Africa, such would fall within the echelons of grievous bodily harm. Just as the English court was faced with interpreting the consensual relationship, not exclusively to the harm caused, but also in consideration of public policy to such a practice; so too would a South African court's inquiry be entrenched. The case of *R v Lock at Ipswich Crown Court* (Judgement on 22nd January 2013) also draws upon the behest of the doctrine of public policy in tempering a court's judgement in the contemporary interpretation of an act of consensual sadomasochism that brings a measure of actual bodily harm upon a person. This emerging factor of assessment is not absolute and is transparently reviewed upon the facts of each case. Thus, where an individual engages within a consensual sadomasochistic relationship that brings, or promises, a harm such as the death of the submissive; this will automatically fail as a legally recognised consensual sadomasochistic relationship. See also Hanna 'Sex is not a

The South African Criminal law would be justified in the restriction of an adult's capacity to consent to a particular act that brings imminent harm of a gargantuan risk to the safety of a person; and in this inspection, it would appear to expand within the concept of the commission of serious, or grievous, bodily harm and death.²⁸⁷ The fine line of the emerging concept of individual human autonomy,²⁸⁸ bolstered within the *volenti non fit iniuria* doctrine, is trampled underfoot if the State chooses to adopt a visceral and restrictive prerogative in choosing to outlaw a sexual act of this nature; based on the belief that such is uncharted, socially ambivalent, or frowned upon.²⁸⁹ The latter reflects the viewpoint of many authors from the 21st century regarding the stance of the House of Lords in *R v Brown*,²⁹⁰ the once quintessential piece of legal literature in overlooking the defence of consent to bodily harm in the pursuit of sexual gratification.²⁹¹ It should also be noted that the majority of the House of Lords also emphasised the concept of a social utility that must be drawn from sadomasochism for it to be considered within the bracket of accepted exemptions to the commission of actual bodily harm.²⁹² This, once again, proves to dwindle as a notion of importance within the developing timeline of consensual sadomasochism, along with the already established perceptions of the South African criminal law's stance regarding consensual bodily harm.

This circle of contemplation spirals into the facts of each unique sexual encounter by the participants, and such, as explored by the developing international timeline, shall not override the defence of consent to bodily harm purely on the harm caused. The defence of consent to grievous bodily harm within a sadomasochistic activity that falls within the jurisdiction of South Africa will be left for the consideration of the relevant court, based on the factors that include for the nature of the consensual relationship, public policy, and the principle of individual human autonomy in relation to such.

support: Consent and violence in criminal law' (2001) 42 *Boston College Law Review* 241, expressing that "*On the other end, the state has a compelling interest in protecting its citizens from death.*" This proves that even if the violence is consensual within the relationship, such may violate 'normative' legal behaviour and public policy considerations.

²⁸⁷ *S v Sikakane* (B/Dh3625/08) [2009] ZAGPJHC 10 (14 April 2009) at para 6.

²⁸⁸ D. Arnold 'Vagueness, autonomy and *R v Brown*' (2015) 1 *UniSA Student Law Review* 103.

²⁸⁹ Craig 'Capacity to consent to sexual risk' (2014) 121.

²⁹⁰ Moulds 'Is society still shackled with the chains of a 1993 England? Consent, sado-masochism and *R v Brown*' 79.

²⁹¹ I. Leader-Elliot 'Sadomasochists unshackled?' (2015) 1 *UniSA Student Law Review* 98.

²⁹² Bielefeld 'The culture of consent and traditional punishments under customary law' 145.

2.4 Conclusion

The submissions of this chapter are derived from the views of judges, precedent, statute and other common law regimes that need not be mentioned again. After shedding insight into the consensual nature of sadomasochism from both the spheres of England and Canada, it is evident that consent to actual bodily harm is the minimum threshold for a court to intervene within the private sexual practice. The gravity of the developing timeline of the international precedents adds persuasive value to the possible South African perspective of these practices, juxtaposed in light of the *volenti non fit iniuria* doctrine being the paragon facet for an accused's defence of consent to bodily harm. What is drawn from this once murky lake of judicial ambivalence are the illumination of the factors of public policy and the human rights of the autonomous sexual partners, locked in consensual sadomasochism.

Even when the precursor precedents expire, whether such is usurped by the coming of age of public policy, or the notions of a court are influenced by the developing factor of individual autonomy; somewhere within the private confines of a shared room, radiating in tune with informed consent, lies the hope of a new legal sanctuary for this sexual practice.

CHAPTER 3: THE FORGING OF PUBLIC POLICY AND DEVELOPING SOCIAL PERSPECTIVES WITHIN THE LEGALITY OF CONSENSUAL SADOMASOCHISM

“A government can be no better than the public opinion that sustains it.” - Franklin D. Roosevelt, the 32nd President of the United States of America.

3.1 Introduction

In an attempt to decipher the criminal law’s perspective of consensual sadomasochism between adult partners within South Africa, the inspection of the international judicial precedent within the preceding chapter spurred the surfacing of public policy as a prominent consideration of a court’s inquiry of consensual harm caused. To the developing international considerations, prosecution of an injury caused by a consensual sadomasochistic act, bringing either actual or serious bodily harm, should not be tempered by the assessment of the harm alone. The developing trend for courts from both England and Canada is to consider the hazy allure of the ever-changing principles of public policy. This chapter shall highlight the prominence of the application of public policy in reinforcing a prosecution for consensual sadomasochism, derived from the legal principles that have evolved within the relevant international spheres.

England’s affinity for applying public policy when assessing the harm caused by consensual sadomasochism shall be reviewed by the judicial viewpoints of ‘no good social use’ and ‘the public benefit’ of the consensual acts. These legal perspectives shall be contrasted to the current position of England regarding the demographics of the contemporary social sphere’s exposure to the sadomasochistic material and whether the prominence of such material may restrain the

spearheading of public policy in achieving a prosecution. Lastly, the influence of the pornography industry, depicting sadomasochistic and BDSM pornography within the public sphere, shall be interpreted in light of relevant legislative aids. This inquiry shall consider the possible influence that such material has upon the private sexual behaviour of the public.

The willingness of implementing the doctrine of public policy in sadomasochistic cases arising in the Canadian criminal law jurisprudence shall be mirrored by a similar orbit as that of English law. The Canadian law's stance on the 'social utility' of the practice of sadomasochism shall be considered in light of sexual material available to the public at large, along with other contemporary cornerstones of relevant statutory and social intrigue. This consideration will be projected by the initial failure of the courts in departing from a consistent loop of blanket-interpretation to all sadomasochistic occurrences under past public policy considerations. This will pave the foundation of the criminal law jurisprudence of Canada regarding such occurrences by the eventual blossoming of the contemporary outlook that was brought forward in *Regina v Price*.²⁹³

Lastly, public policy considerations of South Africa will be interpreted in light of the Constitution and its supporting retinue of legal concepts that give effect to fundamental public policy considerations. This shall be drawn from the applicability of the *boni mores* criterion and the concept of Ubuntu as champions to public policy perspectives within South African law. The exploration will attempt to paint a clearer portrait of what the current public policy truly is and the reach of this concept to cases that involve harm to the public. This shall summon insight into the gravity of the legal moralism of the community at large, and whether public policy will be extenuated by South African courts in adding to the legal-arsenal of the State's possible prosecution of acts that cause public harm. This, in turn, will spur the outlook of community harm and Constitutional imperatives of ensuring public safety. Finally, this will attempt to ascertain whether a South African court, if faced with a matter that brings such harm, would allow for the triumph of public policy considerations over the autonomous actions of the consenting adult partners.

Chapter 2 of this thesis examined relevant cases from both Canada and England regarding the assessment of sadomasochism and the varying degrees of consensual bodily harm. Such shall not be revisited, and only relevant policy considerations will be plunged into this chapter's realm of legal examination. The concord of implementing public policy by both the English

²⁹³ *Regina v Price* 2004 BCPC 0103.

and Canadian courts are harnessed as a decisive factor in the justification of the State's prosecution of sadomasochism; albeit with scrutiny and much debate along the ripples of time.²⁹⁴ To determine the relevance of public policy within this grey-area of criminal law, an exploration into the foundations of the concept must be explored.

The High Court, in the South African case of *Minister of Education v Syfrets Trust Ltd NO* defined the concept of public policy as:

*'[Just as] its synonyms, boni mores, public interest and the general sense of justice of the community – is not a static concept, but changes over time as social conditions evolve and basic freedoms develop.'*²⁹⁵

The aforementioned consideration illustrates that the public interest is a synonym for public policy,²⁹⁶ along with the allotting of the *boni mores* criterion within this niche in South African law. At its core, the evolution of time moulds the transition of public policy to be malleable within the current paradigm of social perspectives and in the direction of an authoritative creation of values, objectives, and goals within the public at large.²⁹⁷ Guidelines in developing and honing policy considerations of the public should be created upon the needs of the public itself.²⁹⁸

Jean-Baptiste Alphonse Karr stated within his epigram, *'plus ça change, plus c'est la même chose'* which loosely translates as *'the more things change, the more they remain the same.'*²⁹⁹ This stands within a cacophony against the principle etymology of public policy, as the nature of public policy is not static.³⁰⁰ Instead, public policy exists as a panoply of the Constitution of South Africa.³⁰¹ Therefore, the State is under a duty of care to the public at large in order to facilitate the constitutional foundations that influence the public sphere and to prevent against such foundations befalling harm and infringement.

²⁹⁴ The case of *R v Brown* [1994] 1 AC 212 endures as a much debated node within the legality of consensual sexual violence and its permissibility within a legal system.

²⁹⁵ *Minister of Education v Syfrets Trust Ltd NO* [2006] ZAWCHC 65; 2006 (4) SA 205 (C) (24 March 2006) at para 24.

²⁹⁶ See *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* [2010] ZASCA 136; 2010 (6) SA 518 (SCA) which confirms the comprehension of public policy as the 'public interest', at para 40.

²⁹⁷ N.L. Roux 'Public policy-making and policy analysis in South Africa amidst transformation, change and globalisation: Views on participants and role players in the policy analytic procedure' (2002) 37 *Journal of Public Administration* 425.

²⁹⁸ *Ibid* 421.

²⁹⁹ V. Bhargava 'Plus ça change, plus c'est la même chose [the President's Page]' (2013) 51 *IEEE Communications Magazine* 6.

³⁰⁰ *Minister of Education v Syfrets Trust Ltd NO* [2006] ZAWCHC 65; 2006 (4) SA 205 (C) (24 March 2006) at para 24.

³⁰¹ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 28.

3.2 England

3.2.1 Overview

The stance of the English criminal courts, in the years of consensual sadomasochistic inquiry, projects that the individual autonomy rights of adults are far from absolute where one consents to and performs activities that result in actual bodily harm, or greater.³⁰² The case of *R v Coney* paved the English common law's perspective on the relationship of the doctrine of public policy to activities that bring actual bodily harm.³⁰³ The practice of bare-knuckle fighting was held to contradict the values of the public interest and that the very acceptance of the magnitude of actual bodily harm would vitiate consent itself, rendering such a practice as an assault.³⁰⁴ Thus, a criminal offence was borne in *Coney*, despite the participant's willingness, eagerness, unequivocal consent, and desire to participate in the activity in question. Further, this also attempts to dissuade the public itself from supporting and witnessing such a 'sport'. The common law stance of *Coney*, and the applicability of the doctrine of public policy in perceiving a consensual practice to be unlawful; presents itself as almost a defining factor for a criminal court's inquiry in determining lawfulness.

In *Attorney-General's Reference*,³⁰⁵ the court entrenched that certain public practices fell within accepted exemptions to a prosecution where actual bodily harm, or greater, occurs from a consensual physical relationship. However, the English criminal law jurisprudence cemented the perspective of *Coney*,³⁰⁶ stating that consensual injuries, which occur in actual bodily harm or greater, are contrary to public policy considerations of preventing against harm unto others and cannot be validly consented to.³⁰⁷ The State renders this activity as an assault, based on the intensity of the harm caused by the intentional conduct of the accused.³⁰⁸ This thus proves that

³⁰² Moulds 'Is society still shackled with the chains of a 1993 England? Consent, sado-masochism and *R v Brown*' 75.

³⁰³ *R v Coney* (1882) 8 QBD 534.

³⁰⁴ Ibid.

³⁰⁵ *Attorney General's Reference (No 6 of 1980)* [1981] QB 715.

³⁰⁶ *R v Coney* (1882) 8 QBD 534.

³⁰⁷ A. Kerr 'Consensual sado-masochism and the public interest: Distinguishing morality and legality' (2014) 2 *North East Law Review* 56.

³⁰⁸ Padfield *Criminal Law* (2012) 104.

an accused could not avoid criminality, despite the consent and willingness of the participants to the practice.³⁰⁹

Public policy in England has rooted beliefs in the concepts of ‘social utility’ and ‘good reason’ in attempting to justify activities that cause measures of bodily harm within the public.³¹⁰ There have been numerous developments in English law, as mentioned under Chapter 2 of this dissertation, which are accepted by the courts of the land as exemptions to the inherently unlawful harm that is practiced between consenting adults. This is inspired by the displacement of the activities that have garnered a measure of social acceptance and utility within the foothills of public policy.

The emergence of the defence of consent to bodily harm by consensual sadomasochism proves to fail as a justifiable social exemption by the judiciary England in the context of the act itself, for the interests of public safety rebukes such harmful practices on the absence of any apparent social benefit.³¹¹ What is pertinent about this submission is that it inflates the brewing cloud of the doctrine of public policy within the jurisprudence of England, carving inroads into both the public and private sphere of autonomous adult interaction as desiring a ‘social benefit’ from sadomasochism for it to be legally valid. The interpretation of public policy at this judicial juncture proved to be as far reaching as to the very sanctums of individual private settings,³¹² as was later confirmed in *R v Brown*.³¹³

The judgement of *Brown* struts and frets within this judicial comparison in a lingering aura of the desired critique regarding the emergence of public policy within the judiciary’s interpretation of consensual sadomasochism. The majority of the House of Lords, in the reliance of the doctrine of public policy to prosecute the actions of the accused sadomasochists, saw the act as cruel and barbaric, unsettling within a civilised society and harmful to the public at large. Lord Templeman of the majority, as quoted earlier, perceived sadomasochism as ‘evil’ within a moralistic society.³¹⁴ The impetus of Lord Templeman’s viewpoint serves as a caveat to those that would indulge in such ‘pleasures by violence’ that bring actual bodily harm,

³⁰⁹ *Attorney General's Reference (No 6 of 1980)* [1981] QB 715.

³¹⁰ *Ibid* 719.

³¹¹ Moulds ‘Is society still shackled with the chains of a 1993 England? Consent, sado-masochism and *R v Brown*’ (2015) 77.

³¹² *Attorney General's Reference (No 6 of 1980)* [1981] QB 715.

³¹³ *R v Brown* [1994] 1 AC 212.

³¹⁴ *Ibid* 237.

entrenching the prosecution of this practice that was, and is, perceived as divergent to public policy and failing to fall within the framework of social utility.³¹⁵

The issue that arises capriciously from the majority viewpoint in *Brown*, as noted by Kerr,³¹⁶ is the implementation of what is considered by the judiciary to be ‘in the public interest’; by virtue of a proposed ‘moralistic’ criminalisation of sadomasochism. This stance nestles within the thicket of State paternalism as an over-arching dictator in restricting the autonomy of consenting adults.

Lord Templeman, acting as a custodian for public policy and public safety, vied for a moralistic proposition for the prosecution of consensual sadomasochism, as such existed within sectors of ‘cruelty and evil’. His supporting retinue of Lords, Jauncey and Lowry, brought forward the paternalistic perspective that the State may intervene within the private sexual activities of adults where such is merged with violence to derive gratification, and capable of inspiring public violence. To Lords Jauncey and Lowry, the State has a prerogative in controlling and safeguarding the exposure of the general public to violent conduct that bears no ‘social utility’, that which has the potential of ‘corrupting others’ within the said public. Albeit consensual, the majority deemed the intentional application of force that causes bodily injuries for sexual gratification to be an inherent failure of any ‘social utility’ and unable to add substantial and compelling ‘good reasons’ for the harm itself.

The dissent of Lord Mustill and Slynn gnawed at the validity of the implementation of public policy as a factor of legal consideration of the court prosecuting consensual sadomasochism. To Lord Mustill, the interests of the community in examining the legality of the case at hand should not be done on default application by a court; rather, such should be inspected upon a case-by-case basis upon individual merits. The doctrine of public policy is a pertinent factor for the uprooting of violent conduct that has seeped through the crannies of the social demographic; however, the judicial granite to combat such conduct must also give way for civil libertarianism, as put forward by the minority.

The reason for *Brown*’s perpetuity as an ongoing debate, tied to public policy considerations within the prosecution of consensual sadomasochism, is the application of state paternalism lassoing the private sphere of individual autonomy within immediate judicial scrutiny.³¹⁷ The

³¹⁵ Kerr ‘Consensual sado-masochism and the public interest: Distinguishing morality and legality’ (2014) 51.

³¹⁶ Ibid 52.

³¹⁷ Simester et al. *Simester and Sullivan’s Criminal Law Theory and Doctrine* (2016) 784 -785.

justification of public policy as a factor for prosecution and conviction of the sadomasochists is tailored within a lucid tier of what was considered ‘moral’ by the majority of the House of Lords. The position of the majority, by one fell swoop of their gavels, attempted to safeguard the community at large by prosecuting a minority group’s actions that caused ‘moral harm’ and endangered the health and safety of the public at large. The House of Lords, in attempting to shield the public from knowledge of this practice, inevitably opened a Pandora’s Box of its own making, as the sadomasochistic practices were widely publicised upon the prosecution.

As laden with complexities and debate as the House of Lord’s judgement was, the contrast of the legality of public policy applied in *R v Wilson* is a reflection of the ‘black and white’ judicial frontier of interpretation within English law.³¹⁸ The court understood that public policy considerations would not favour a prosecution of the accused to the crime of actual bodily harm, as the action fell within an exempted practice of consensual bodily harm, being that of tattooing. What arises from this submission of public policy, exempting criminal sanction upon a husband who had carved his initials upon the buttocks of his wife, proves that there are established categories of accepted exemptions to a prosecution of actual bodily harm that will be favoured and tolerated as non-criminal by the English doctrine of public policy.³¹⁹

Just as the myth of Janus, with two heads facing December and January respectively, the judiciary found actual bodily harm to be either inherently unlawful; based on the harm caused by the consensual practice within society, or exempt from criminal sanction where such harm fell within a niche of acceptance by means of social utility or social cognisance. The stark duality between *Brown* and *Wilson* in applying public policy as a deciding factor to the unlawfulness of consensual harm exposes a multitude of social and moral facets considered by the respective courts.

One of the factors in safeguarding societal and public interests by the House Lords in *Brown* was to prevent against the real risk of HIV infections,³²⁰ whereas such was not the consideration of public policy in *Wilson*, as such was viewed in light of tattooing.³²¹ As paternalistic as the majority judgement of the House of Lords may be, such has come under the scrutiny of

³¹⁸ *R v Wilson* (1996) 2 CR App Rep 241.

³¹⁹ See *Attorney General's Reference (No 6 of 1980)* [1981] QB 715.

³²⁰ See A Kelkar “Blurred Vision: How Flawed Was *R v Brown*?” (11 February 2013), Retrieved from <http://durhamprobono.blogspot.com/>. where the House of Lords Judgement in *R v Brown* has been scrutinised as homophobic. (Accessed on 22 June 2018).

³²¹ *Ibid.*

implementing a criminal sanction at the moral behest of the individual Lords themselves,³²² rather than the values entrenched by the criminal law and the doctrine of public policy. Both cases involve consensual harm occasioning in actual bodily harm, yet *Wilson* went by unpunished, as the conduct of the participants were deemed to be ‘within the norm’ of socially sanctioned forms of bodily harm (tattooing) between consenting adults.

Furthermore, the House of Lords found justification in its comparison of the violence within the sexual practice to the violence within a recognised sport. In light of the doctrine of public policy, a decisive test of the exemption of actual bodily harm caused in recognised contact sports is viewed as incidental to the game.³²³ The objective of the sporting activity is to win the game, and any form of sporting violence is not done in revelry.³²⁴ Consensual sadomasochism, in light of the assessment by the doctrine of public policy as raised by the House of Lords, administers a form of violence that is pursuant of hedonism. The two philosophies of violence exist in separate planes within the application of public policy by the courts.

The House of Lords, exposed by the majority judgement, put forward a consideration for the necessity of a prosecution of an unidentified practice, such as sadomasochism, that has an objective to inspire violence, which brings actual bodily harm for sexual gratification. It is not as simple as defining the rules of sporting activities which are regulated by codes and governing bodies, whereas sadomasochism is generally structured and regulated by the participants themselves. The State shall allow such authoritative bodies to control sports, yet restricts individuals to control their private and consensual sadomasochistic activities. Thus, the court in *Brown* regarded public policy considerations to supersede that of sexual expression. W Wilson stated interestingly that:

*‘It is arguable that the House of Lords decision in Brown should be treated not as a test case for sexual freedom, but for the idea that even a tolerant, pluralistic society must enforce one fundamental residual moral value.’*³²⁵

The judiciary of England, post-*Brown*, proved that it would not allow the public to intentionally injure and inspire the recreation of an act of violence. However, as evidenced in *Wilson*,³²⁶ such

³²² Stuart as cited in Kerr ‘Consensual sado-masochism and the public interest: Distinguishing morality and legality’ (2014) 61.

³²³ J. Standen ‘The manly sports: The problematic use of criminal law to regulate sports violence’ (2009) 99 *Journal of Criminal Law and Criminology* 633.

³²⁴ Ibid 623.

³²⁵ W. Wilson ‘Is hurting people wrong?’ (1992) 14 *Journal of Social Welfare and Family Law* 388.

³²⁶ *R v Wilson* (1996) 2 CR App Rep 241.

may be exempt from punishment where there are sufficient 'good reason' and 'social utility' for the purpose of the conduct. These two pivotal prodigies of the English law's stance bring a double-edged sword into the assessment of consensual harm. Public policy is an ever-evolving and developing principle, that which is projected within a kaleidoscope of relevant legal developments. The legal approach of the judiciary in applying the doctrine of public policy is an important facet of the approach of a court when hearing a matter regarding consensual sadomasochism.

The English judiciary, and its readily implemented doctrine of public policy is populated by judicial intrigue regarding the existence of other avenues of legal focus. The judgement of *Brown* gave no quarter for individual autonomy, as the House of Lords wished to give credence to the interests of public health and morality. Thus, to the House of Lords, the public interest must encompass that which is morally shared by the community at large and the implementation of state paternalism exposed the sexual behaviour as contrary to such principles. However, as the years of judicial development grew within the country, the understanding of that which is 'morally frowned upon' did not essentially demand criminal prosecution to be rigidly implemented by courts.³²⁷

A transparent and guided definition by a court regarding the actual definition of public policy within England appears to be omitted by the judiciary as far as the *Attorney General's* decision is concerned. Moreover, the compelling factor of prosecution for 'no good reasons' to a practice that brings degrees of harm exists within an obscurity of fact if the act in question cannot satisfy the 'good reasons' requirement, rendering such as prima facie criminal. Thus, the discretion of the judiciary becomes a noteworthy factor of consideration when interpreting the entirety of public policy in determining the legality of consensual sadomasochism that causes actual bodily harm. Therefore, without a clear illumination on what a 'good reason' is within the concept of the England's public policy, the possible perspective of the judiciary's personal prerogatives are allowed to sprout and sculpt a final decision based on such liberty. The causing of actual bodily harm remains the commanding benchmark of judicial intervention when public policy is concerned, leading to the prosecution of sadomasochistic activities. The findings at the judicial juncture, catapulted by the court in *R v Brown*, proved that even the private activities of consensual conduct fall within a trembling crescendo of State intervention, by virtue of the proposed public policy considerations.

³²⁷ See Kerr 'Consensual sado-masochism and the public interest: Distinguishing morality and legality' (2014).

The Law Commission of the country contended the stance adopted in *Brown* upon its consultation of public policy's proposed footing regarding consent to actual bodily harm in the criminal law.³²⁸ The Commission observed that no immediate interference by courts into the private lives of the consenting sexual partners is necessary, provided the interests of society and the public are upheld and protected within the sexual dynamic. The Commission went on to acknowledge that the nature of sadomasochism involves humiliation and/or physical violence to attain sexual gratification, and heighten the desired sexual experience of the partners.³²⁹ The Commission advocated for a clearer definition of consensual sadomasochism and evidentially strays away from the approach adopted by the House of Lords. This was done in hopes of bolstering a clearer social meaning to consensual sadomasochism and its accepted limits in the eyes of English law. To the Law Commission, the public interest may be utilised to interpret the participants' individual rights of autonomy with the sexual relationship.

The Commission, drawing inspiration from the academic opinion of Bamforth,³³⁰ illustrated that the social definitions of the practice of sadomasochism should ideally derive from those who participate in such activity.³³¹ Bamforth concludes by surfacing a point of interest, which nudges the doctrine of public policy forward within this stream of criminal law, asserting that sadomasochism should be interpreted within its sexual nature, rather than the violence it stirs within the private relationship. The Commission's proposal for reforming the reach of public policy within the legality of consensual sadomasochistic relationships is assessed in the following measure:

*'[No one] may give a valid consent to seriously disabling injury, but subject to this limitation the law ought not to prevent people from consenting to injuries caused for religious or sexual purposes.'*³³²

This endures as a testament to the growing consideration of individual autonomy of the participants to sadomasochism, and the State balancing its duty to safeguard the fundamental rights of its citizens by placing either exemptions and/or limitations on consensual activities that were earlier deemed as criminal. The State's decision to prosecute a 'seriously disabling injury' that arises during sexual intercourse between consenting partners is derived from the sheer intensity of the harm caused that may affect the public at large, rather than the harm

³²⁸ Law Commission of The United Kingdom "Consent in the Criminal Law: Consultation Paper, No. 139" (1995), 24.

³²⁹ See para 10.48 p145.

³³⁰ Bamforth as cited in the Law Commission report.

³³¹ Ibid.

³³² See para 10.52 p146.

inflicted upon the consenting parties.³³³ However, the Commission exposes that public policy may prove to be a zealous leap in the determination of a threshold to the nature of the harm that may be permitted within a private sadomasochistic relationship, where there is no ‘serious disabling injury’.

Such a mustering of the doctrine of public policy, implemented in accordance with individual autonomy and sexuality rights, could serve in overturning the ambiguity of *Brown*’s proposed policy considerations for a prosecution of consensual sadomasochism. Professor David Feldman,³³⁴ as mentioned within the Commission’s report, challenges the notion of public policy establishing a ‘social utility’ in violent practices such as boxing, but automatically discrediting the violence within sadomasochism.³³⁵ The Law Commission, by propelling Feldman’s opinion, submits that by endorsing sexual expression within the public sphere, the prevailing personality rights of the participants to sadomasochism may allow for a more favourable judicial interpretation of the practice.³³⁶

3.2.2 The Influence of Sadomasochistic Material in the England

The Criminal Justice and Immigration Act of the United Kingdom offers a momentary detour from the exploration of case law and allows for contemporary insight into the opened floodgates of sexual material within the public.³³⁷ Various forms of sexual imagery and material are no cypher to human society, as erotic artwork, architecture, and literature have existed since time immemorial for most civilisations and are available, even freely, to the public at large.³³⁸ Adult sexual content and material have emerged in a ‘gold-rush’ influx within the very fabric of Internet web pages and social media outlets alike. The pornography industry stands as a multi-billion dollar global industry within the labyrinth of the Internet-age, and continues to grow exponentially in such a medium within the public sphere.³³⁹

³³³ See para 2.18 (7) p20, where the Law Commission will not permit *seriously disabling injuries*, even where consent is voluntarily given, as the concern of preventing the increased likelihood of such a harm unto others within the public is an incentive for the Commission.

³³⁴ Feldman as quoted in the Law Commission report 145.

³³⁵ See para 10.46.

³³⁶ Ibid.

³³⁷ Criminal Justice and Immigration Act 2008.

³³⁸ Kutichinsky ‘Pornography, sex crime, and public policy’ (1991) 41.

³³⁹ Rosen as cited in Shor and Seida ‘Harder and harder?’ Is mainstream pornography becoming increasingly violent and do viewers prefer violent content?’ (2018) *Journal of Sex Research* 1, account for the estimated value

With such technological advancements, pornographic material within the contemporary society is accessible in high-quality formats, at the fingertips of the viewer.³⁴⁰ The depiction of such explicit sexual material on such a vast medium proves that the concept of sexual liberalism is a growing perspective within society at large;³⁴¹ expressing a multitude of preferential choices for the viewer to the nature of pornography in which they desire.³⁴² The sexual emancipation of pornography, as assessed by Kutchinsky within his report *Pornography, Sex Crime, and Public Policy*,³⁴³ expresses the need for sexual arousal that has

*'[A]wakened and strengthened a latent need for erotica among many people.'*³⁴⁴

Drawing inspiration from the aforementioned viewpoint, the nature of erotica has progressed in the desires of audiences to include for a greater panoply of 'rough, aggressive, and demeaning' forms of pornography, departing from the 'vanilla' porn of old.³⁴⁵ Shor and Seida put forward two paramount assertions regarding the increase of physical aggression within modern-day pornography³⁴⁶ that is prevalent within the contemporary public sphere. Such are integral within the fundamentals of this chapter's focus of public policy considerations to the legality of consensual sadomasochism. This asserts to put forward the contemporary perspective of whether the viewers, within the public itself, show an affinity toward this trend of sexual aggression between partners.

The first assertion is that modern-day pornography is presumably injected with far more aggressive physical behaviour, especially toward women, and growing in prevalence with each passing year.³⁴⁷ The second assertion of the academics suggests that the rapidly rising wave of physically aggressive pornography is due to the preferences and demands of the viewers themselves.³⁴⁸ These assertions lend novel developments to the consideration of the public's exposure to sexual practices involving physical aggression, be it from the pulling of hair, to the

of the international porn industry to be \$100 billion as of 2010. See also Strange but True "How Big Is the Porn Industry?," *Medium* (19 February 2017), Retrieved from https://medium.com/@Strange_bt_True/how-big-is-the-porn-industry-fbc1ac78091b. (Accessed on 24 June 2018).

³⁴⁰ Kutchinsky 'Pornography, sex crime, and public policy' (1991) 42.

³⁴¹ Ibid.

³⁴² Shor and Seida "Harder and harder'? Is mainstream pornography becoming increasingly violent and do viewers prefer violent content?' (2018) 16.

³⁴³ Kutchinsky 'Pornography, sex crime, and public policy' (1991) 42.

³⁴⁴ Ibid.

³⁴⁵ Shor and Seida "Harder and harder'? Is mainstream pornography becoming increasingly violent and do viewers prefer violent content?' (2018) 16.

³⁴⁶ Ibid 3.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

spanking of a sexual partner, or to much more aggressive forms of sadomasochism.³⁴⁹ Thus, the assertions of Shor and Seida project that it is the public who inevitably alter the evolution of the sexual ecosystem within the pornographic industry itself, based on the desire and demand for more physically aggressive pornographic depictions.

Under section 63(2) of the Criminal Justice and Immigration Act, the criminalisation of possession of ‘extreme pornographic imagery’ is put forward.³⁵⁰ Section 63(7) further bolsters this notion by stating:

‘An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following—

- (a) an act which threatens a person's life,
- (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
- (c) an act which involves sexual interference with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive) and a reasonable person looking at the image would think that any such person or animal was real.’³⁵¹

This emphasises the legislature’s stance, *inter alia*, on sexual material that depicts a danger to the safety of one’s life and bodily integrity. Such an illustration is a tremendous springboard for the legislative organs of England in codifying the importance of health and safety within the public domain, for the statute acknowledges that sexual imagery may entice the public to recreate that which they are exposed to. The ambit of section 63, correlating to sadomasochism, works as a caveat to those that would recreate activities that bring the suffering of life and the injury of the body within sexual fantasies.³⁵² The practice of consensual sadomasochism, if agreed upon by the participants, may rightly bring such danger to the sexual partners within their sexual dynamic, as contained within the aforementioned provisions of the Act.³⁵³ Indirectly, the legislature of the England takes yet another step in quashing any appeal to the consensual bodily harm caused by sadomasochism by the partners’ inspiration of sexual material depicting such.³⁵⁴

³⁴⁹ Ibid 5.

³⁵⁰ Section 63(2) of the Criminal Justice and Immigration Act 2008.

³⁵¹ Section 63(7).

³⁵² Sections 63(7)(a) and 63(7)(b).

³⁵³ Ibid.

³⁵⁴ See also the Obscene Publications Act 1959 C. 66 of the United Kingdom which stands as a noteworthy piece of legislation within the United Kingdom, adding a statutory dimension to the law governing obscene publications.

As mentioned earlier, the availability of pornographic material within the public sphere is widespread by the ease of accessibility via the Internet.³⁵⁵ The influx of aggressive pornography may be viewed as the herald to sadomasochism's introduction at a heightened level within the public.³⁵⁶ This carries significant social value as the general public can no longer be viewed to be ignorant to the practice of sadomasochism where there is sufficient information of its prevalence within its social landscape.

The Act is not without salvation for those subject to a prosecution under section 63.³⁵⁷ The statute further sets down section 66,³⁵⁸ which serves as a defence for those that have participated in consensual sexual acts that are inspired by 'extreme' pornographic material.³⁵⁹ Consent is once again a pertinent factor to English's legislature and its translation of extreme sexual acts.³⁶⁰ This is problematic for the development of England's judicial perspective in light of the doctrine of public policy and its viewpoint on consensual sadomasochism. This is not attributed to the surge of aggressive sexual material made available within the public,³⁶¹ but to that of the leading precedent, the juggernaut known as *R v Brown*.³⁶² The reach of the House of Lord's precedent is radiant within the provision's ambit in criminalising actual bodily harm that may arise from a sadomasochistic encounter,³⁶³ even where such is induced by the sexually aggressive material.³⁶⁴ Thus, it is not the intention of the legislature to endorse sexual violence to be practised within the public, even if such is already mingled within the public sphere by the aggressive and extreme sexual material.

The legislature's accommodation of a defence for an accused, who has participated in the provision's outlined sexual activities,³⁶⁵ are not absolute, yet such may be sustained as a defence under section 66 (A2) where the requisite elements are satisfied.³⁶⁶ An accused to an assault

³⁵⁵ J. Clough 'Possession of "extreme" pornography: Where's the harm?' (2015) 13 *Canadian Journal of Law and Technology* 131.

³⁵⁶ Akhtar 'Sado masochism and consent to harm: Are the courts under undue pressure to overturn *R v Brown*?'

³⁵⁷ Section 63 of the Criminal Justice and Immigration Act 2008.

³⁵⁸ See section 66.

³⁵⁹ See Section 63(2).

³⁶⁰ See section 63(7) which furthers the perception that a reasonable viewer to such extreme sexual material will view such as real depictions of non-consensual penetration.

³⁶¹ Shor and Seida "Harder and harder"? Is mainstream pornography becoming increasingly violent and do viewers prefer violent content?' (2018) 16.

³⁶² *R v Brown* [1994] 1 AC 212.

³⁶³ See section 66(3)(a) of the Criminal Justice and Immigration Act 2008 that highlights non-consensual harm may occur where 'the harm is of such a nature that the person cannot, in law, consent to it being inflicted on himself or herself'.

³⁶⁴ Section 63(7)(b).

³⁶⁵ See section 63(7)(a) - (c) and section 63 (7A).

³⁶⁶ Section 66 (A2).

that emanates in actual bodily harm from the sadomasochistic relationship may successfully satisfy the defence nestled within the section where the participants have actively involved themselves within the depicted practice. Secondly, the accused must satisfy that the activity did not occur in non-consensual sexual penetration, or harm, between the participants. A consensual sadomasochistic encounter that is induced by the material available to the public has the possibility of allowing for the exemption of a prosecution by a court, based on the exemptions contained within section 66 (A2). However, if the appropriate English court applies the principles of *Brown*, public policy considerations would not allow for such a defence to be valid, based on the harm being morally divergent to a civilised society.

Evidentially, England's growing judicial archives of legal literature relating to consensual sadomasochism stands as monolith point of considering public policy's role in this legal niche of consensual harm. The once champion judicial stance of *Brown*, implementing facets of public policy to prosecute consensual sadomasochism, appears to be challenged as legislation and social awareness itself have emerged to outline the very nature of consensual sadomasochism in a flurry of accessible forms and current public prerogatives.

3.3 Canadian Perspective

3.3.1 Overview

The doctrine of public policy is not elusive within Canadian criminal law jurisprudence, and such has been applied well before the emergence of sadomasochism, which causes actual bodily harm, by the Canadian judiciary. The focus of this segment is the extent of public policy's reach when a court is assessing sexual violence that results in actual bodily harm, or greater.

To set the stage for the Canadian perspective of the utility and impetus of public policy in determining the possible criminality of consensual sadomasochism, the case of *R v Jobidon* shall be explored.³⁶⁷ *Jobidon* mirrors that of the *Attorney General's Reference* from the English perspective, applying the doctrine of public policy to nullify the consent of individuals who

³⁶⁷ *R v Jobidon* (1991) 2 SCR 714.

engaged in consensual brawls.³⁶⁸ This arrives at a definitive peak of what is viewed as safe consensual physical activity whilst interpreting the nature of the harm caused as being that which the doctrine of public policy shall not condone. Thus, even genuine consent to actual bodily harm may be vitiated where public policy triumphs with a greater societal call.³⁶⁹ The common law position of applying policy considerations to nullify consent where the harm administered is ‘beyond transient and trifling’ appeared to be a harm-driven inquiry by the court.³⁷⁰

The early application of public policy within the criminal law jurisprudence of Canadian law proves to be akin with the English Law’s stance. Individual autonomy to engage in such fist fights are balanced against the compelling public interests of safety and security against said harm. Steed categorically divides the factors of inquiry raised by the majority in *Jobidon* into four brackets within public policy,³⁷¹ which are assessed in light of the ‘public interest’ and ‘societal norms’ perspective.³⁷² Steed, interpreting the majority of *Jobidon*, observes:

- (1) ‘The social uselessness of fights.’³⁷³
- (2) ‘The concern that fights lead to larger breaches of the peace.’³⁷⁴
- (3) ‘The importance of deterring fist fights.’³⁷⁵
- (4) ‘The moral need to discourage intentional hurting.’³⁷⁶

The first policy consideration exists in congruency with the English Law’s stance of a ‘social utility’ for the consensual physical practice that brings actual bodily harm. Where such an activity lacks a social usage, *Jobidon* clearly entrenches that public policy finds no good reason in permitting a practice that causes serious bodily injury amongst consenting adults.³⁷⁷

The second policy consideration projects that the judiciary implants the doctrine of public policy to ensure that public disarray, in the form of the breach of the public peace, does not

³⁶⁸ *Attorney General's Reference (No 6 of 1980)* [1981] QB 715.

³⁶⁹ *R v Jobidon* 1991 2 SCR 714.

³⁷⁰ E.R. Steed ‘When yes means no an examination of the distinction between genuine consent and acquiescence’ (1997) 110.

³⁷¹ *Ibid.*

³⁷² *Ibid* at 121.

³⁷³ *Ibid.*

³⁷⁴ *Ibid* at 122.

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

occur in the wake of activities that may bring serious bodily injury and harm to the public domain.

The third policy consideration stressed the importance of the paternalistic approach that the judiciary will take in limiting the individual autonomy of the consenting adults to such activities by applying public policy to deter against consensual fistfights that serve no social utility.

Lastly, the final policy consideration focuses on a moral need, which is intrinsic within the public, to discourage intentional hurting amongst the members of the public. This consideration ripples across the pond of the Canadian perspective in determining that which the public views as 'moral', empowering a court to uproot activity that brings a 'moral' harm, or threatens the sanctity of public morality and integrity. The same consideration of preventing against moral harms was raised in *R v Brown*, however, that being the identification of a compelling justification for public policy's limitation of individual autonomy; even where the harm practiced is branded as 'immoral'. The majority in *Jobidon* contended that civilised societies are embedded within the understanding that the intentional causing of actual bodily harm, or greater,³⁷⁸ is contradictory to the morals of the society and such is not only supported by the common law but also drawn upon within the Canadian Criminal Code itself.³⁷⁹

Jobidon effectively expresses that public policy did not recognise apparent consent to bodily harm as a form of effective consent in relation to the harm that is caused.³⁸⁰ This stretched an over-arching branch of State paternalism that limits individual autonomy to private and/or personal activities, in order to instil a consensus regarding the manner in which individuals should be treated within the public domain. The Canadian Law Reform Commission, in its 1984 working paper titled '*Assault*,³⁸¹' explicitly outlines that one's consent will not be valid where 'serious bodily harm' arises from the consensual practice.³⁸²

The case of *R v Welch* serves as the penultimate precedent (for its current timeframe) in assessing consensual sadomasochism in Canadian law.³⁸³ Here, the considerations of public

³⁷⁸ See section 14 of the Criminal Code of Canada, R.S.C. 1985 C. 46 that reflects a similar policy consideration in preventing the extent of consent to 'moral harms' such as the causing of death.

³⁷⁹ Steed 'When yes means no an examination of the distinction between genuine consent and acquiescence' (1997) 123.

³⁸⁰ *R v Jobidon* (1991) 2 SCR 714.

³⁸¹ Law Reform Commission of Canada "assault, working Paper 38" (1984).

³⁸² Ibid at 7, 24.

³⁸³ *R v Welch* (1995) 25 OR (3d) 665.

policy played a decisive role in the court's approach in prosecuting the sadomasochistic actions of the accused. This sparks the ignition of the possible restriction of autonomy once more by the application of public policy and the methodology of a criminal court in prosecuting consensual sexual violence that brings actual bodily harm.

The court in *Welch* applied a 'Social Utility principle', which attempted to ascertain whether the private sadomasochistic actions had any place within the public domain as an exemption to prosecution. The court followed *Jobidon's* majority viewpoint in light of public policy, interpreting the harm caused from the sadomasochism to be against public morality and found no 'good reasons' for consensual sadomasochism, arising in actual bodily harm, to be tolerated by public policy considerations.

Where lawful sporting injuries occur, even if such injury parallels the bodily harm caused in *Welch*, public policy may be justified in permitting such an injury as lawful, as the sport is recognised with a measure of social acceptance.³⁸⁴ So too is mere hurting a consideration of relaxation to the Law Reform Commission of Canada and such is permitted as a defence of consent to said harm that occurs in this form.³⁸⁵ Public policy perspectives of Canada at the time of *Welch* focused greatly on the causing of actual bodily harm, or serious bodily harm, as being an invalidator of consent to such activity. This, once again, highlights the similarity to English law where the general benchmark for a prosecution of said harm is the materialisation of actual bodily harm.

However, the Ontario Court in *Welch* was alive to the nature and context of the severe harm, assessing its advent by the root practice between the individuals to determine whether such may fall within an exemption to the considerations of public policy.³⁸⁶ A therapeutic surgery is within public's interest to permit the causing of severe harm, without liability for the surgeon, bolstering the social utility prevalence of the act itself, along with the policy considerations of the Law Reform Commission in differentiating between permitted and outlawed practices of consensual bodily harm.³⁸⁷ The nature of the actual bodily harm that was administered upon the complainant in *Welch* could not uphold consent to actual bodily harm,³⁸⁸ as the accused had

³⁸⁴ The Law Reform Commission of Canada "Assault: Working Paper 38" 30.

³⁸⁵ *Ibid* at 29.

³⁸⁶ *Ibid*.

³⁸⁷ *Ibid*.

³⁸⁸ *R v Welch* (1995) 25 OR (3d) 665.

not acted in a manner of a recognised social purpose,³⁸⁹ or practice, to the policy considerations of the public.

Public policy's applicability in *Welch* did not attempt to add consensual sadomasochism that brought actual bodily harm into an exemption category and the court noted that:

*'Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.'*³⁹⁰

Welch itself instils state paternalism over individual autonomy by promoting that public interest wishes to preserve social order, preventing the spread of violence and injury and forming compelling viewpoints of the public peace.³⁹¹ The perspective of violence inflicted for sexual gratification was considered as a moral harm within the Canadian public; affecting the sanctity of the human body and sufficient for the Ontario court to utilise public policy as a sledgehammer in eradicating the defence of consent to actual bodily harm from the practice.³⁹² Therefore, the common law authorities and the statutory powers did not permit sadomasochism to elude the reach of the considerations of public policy and sought to eradicate sadistic behaviour within Canada, especially when tied to sexual activity.

3.3.2 The Influence of Sadomasochistic Material in Canada

The relevant and final case to date in Canada, offering a transitional public policy viewpoint within a Canadian court, which interpreted the extent of harm arising from an injury by consensual sadomasochism, is that of *Regina v Price*,³⁹³ commonly referred to as the 'Sweet Productions' case. A critical inspection of this case is necessary to show the metamorphosis of public policy within the Canadian legal demographic, entrenching sadomasochism as a potential scion to the doctrine itself.

³⁸⁹ See section 267(2) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

³⁹⁰ *R v Welch* (1995) 25 OR (3d) 665.

³⁹¹ Steed 'When yes means no an examination of the distinction between genuine consent and acquiescence' (1997) 122.

³⁹² D.M. Tanovich 'Criminalizing sex at the margins' (2010) 74 *Criminal Reports* 86-95.

³⁹³ *Regina v Price* 2004 BCPC 0103.

The facts of the case and the methodology employed by the court in approaching the legal issues are noteworthy, bringing into the fold of legal inquiry the prevalence of the porn industry within Canada, delivering videos that involve sadomasochism and other atypical sexual practices into the public sphere. The fibres of fact emanating from *Price* questions whether the established ideals of public policy in preventing against moral harm,³⁹⁴ administered from the sexual violence between adults in Canada, still existed as a viable point of entry for a court to effect a prosecution under section 169 of the Criminal Code.³⁹⁵

Mr Randy Price had owned a pornographic studio called ‘Sweet Productions’ that created,³⁹⁶ distributed and circulated a number of pornographic films (referred to as the ‘Eleven Videos’) within the public sphere;³⁹⁷ depicting actors engaging in bondage and discipline, dominance and submission, sadism and masochistic activities.³⁹⁸ Such was alleged by the prosecution as falling into the realm of the obscene material, capable of corrupting the morals of the public³⁹⁹. Once again, the stressing of sadomasochistic practices as being a facilitator of the corruption and impairment of the public’s morals unravels before a Canadian court. Section 163(8) of the Canadian Criminal Code dictates:

‘For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.’⁴⁰⁰

The statute explicitly reflects the perception of the Canadian legislature in outlawing the publication of sexual content within the public sphere depicting, *inter alia*, violence and cruelty; which ultimately forms the subsistence of a sadomasochistic relationship. However, the Criminal Code was enacted before the advent of the Internet’s boom and the widespread pornographic material from this medium.⁴⁰¹ The court noted that up to seventy-three percent (73%) of Canadians at the time of the Sweet Productions case had access to the internet, a vast number of the populous itself;⁴⁰² and that an estimate of at least seventy (70) Internet sites existed which depicted BDSM and sadomasochistic content at that time.⁴⁰³ The court also noted

³⁹⁴ See *R v Welch* (1995) 25 OR (3d) 665.

³⁹⁵ Section 169 of the Criminal Code of Canada, R.S.C. 1985 C. 46.

³⁹⁶ *Regina v Price* 2004 BCPC 0103 at para 1.

³⁹⁷ *Ibid* at para 19.

³⁹⁸ *Ibid* at para. 4.

³⁹⁹ Section 163(1)(a) of the Criminal Code of Canada, R.S.C. 1985 C. 46.

⁴⁰⁰ Section 163(8).

⁴⁰¹ *Ibid*.

⁴⁰² *Regina v Price* 2004 BCPC 0103 at para 15.

⁴⁰³ *Ibid* at para 21.

that the available websites, that publicised such depictions, portrayed imagery and content that included ‘more extreme’ forms of sadomasochism.⁴⁰⁴ These submissions by the court, even if bound by the appropriate sections of the Criminal Code,⁴⁰⁵ illustrate that the exposure of BDSM and sadomasochistic activities had already infiltrated the Canadian public sphere and had grown exponentially by the boom of the Internet-age.

The court was also alive to the growing prevalence of BDSM and sadomasochistic influences within the entertainment industry, as numerous films depicted extreme sexual violence and sexual abuse between adults.⁴⁰⁶ The current age of societal expansion had brought the advent of BDSM centres within the Canadian public, where individuals could pay to observe or to partake in the consensual sexual activity.⁴⁰⁷ In a period of fewer than ten years since the judgment in *Welch* was passed, the court in *Price* appeared to be synthesised to the developing social recognition within the public sphere to sadomasochism and related activities. Thus, the considerations of public policy in determining whether the ‘Eleven Videos’ constituted obscene material that is capable of prosecution was considered by a string of expert testimonies from variant individuals linked to the legally ambivalent practice.

The experts called upon by the court included police officers, medical practitioners and sadomasochists. Their prior exposure to the practices of BDSM and sadomasochism proved paramount in assessing the nature of the ‘Eleven Videos’ and whether the depictions had deviated from the general norm of accepted sadomasochistic behaviour.⁴⁰⁸ Expert witness Dr Moser submitted that the depictions had not deviated from normal human sexual behaviour,⁴⁰⁹ and fell within the general normative values of the BDSM and sadomasochism community (‘The Kink Community’). The court, by effectively allowing an inquest of relevant fact and assessments by experts, arrived at a summit of clarity by submitting that sadomasochism and BDSM were not obscure practices within the current Canadian public.⁴¹⁰

The tipping scale of societal assimilation with the practices of sadomasochism and BDSM came from the testimony of Mr McDonald, a retired police officer of the Vancouver Police Department who had endured skirmishes with such activities during his tenure in law

⁴⁰⁴ Ibid at para 22.

⁴⁰⁵ Criminal Code of Canada, R.S.C. 1985 C. 46.

⁴⁰⁶ *Regina v Price* 2004 BCPC 0103 at para 27.

⁴⁰⁷ Ibid at para 28.

⁴⁰⁸ See paras 29-39.

⁴⁰⁹ Ibid at para 35.

⁴¹⁰ Ibid at para 36.

enforcement.⁴¹¹ The practice of inflicting violence unto a consenting partner for sexual gratification had evolved within public policy itself and entered the echelons of social acceptance to Mr McDonald.⁴¹² This contradicts the stance of the Canadian court in *Welch* where it was viewed that sadomasochism, and related activities, caused a moral harm to the public as such had not found a footing within the societal sphere.

As noted earlier, dictates of the doctrine of public policy would not desire harm to be administered between individuals for ‘no good reasons’, or endorse a practice that carries no ‘social utility’. The ‘Sweet Productions’ case revolutionises this perspective by broadening the test of what the current public policy tenants should permit within the ever-growing societal sphere of adult interaction.

The alleged sexual obscenity of the ‘Eleven Videos’ was juxtaposed to the tests created under existing Canadian law in determining a footing of such material’s tolerance within public policy of Canada.⁴¹³ The case of *R v Butler* confirmed the Canadian parliament’s reach by criminalising both the distribution and sale of obscene material, in line with section 163 of the Criminal Code.⁴¹⁴ *Butler* further entrenched the considerations of public policy to safeguard the morals of the Canadian public at large by limiting the individual autonomy of a group that threatens a moral harm through such obscene publication. The court in *Price* tactfully made mention to *Butler* in that alleged obscene material must not only involve a dominant sexual characteristic, but such must be an ‘undue’ exploitation of the sexual depiction itself to be classified as obscene.⁴¹⁵ The Canadian approach of determining whether a publication of sexual obscenity satisfies the ‘undue’ characteristic and sufficient to cause harm to the public are:

- (1) the Community Standard of Tolerance test;
- (2) the Degradation or Dehumanization test;
- (3) the Internal Necessities test.⁴¹⁶

The community standard of tolerance test proved to be the litmus test of inspection to assess the Eleven Videos. Such attempts to determine what the Canadian public wishes exclusively to the community as a whole, not a minority group. Based on the standards held in *Welch*, the

⁴¹¹ Ibid at para 29.

⁴¹² Ibid at para 37.

⁴¹³ *R v Butler* [1992] 1 S.C.R. 452.

⁴¹⁴ Ibid.

⁴¹⁵ *Butler* as cited in *Regina v Price* 2004 BCPC 0103 at para 74.

⁴¹⁶ Ibid at para 75.

Canadian community has evolved and developed in line with BDSM centres of intrigue and the vast array of internet sites. This proves that the community exists in a contemporary perspective

The court, in attempting to prove beyond a reasonable doubt that the ‘Eleven Videos’ constituted obscene material, sought to ascertain whether the current Canadian public would see the videos as obscene, thus failing the Community Standard of Tolerance test. To the court, expert opinion solidified that the ‘Eleven Videos’ constituted normal sexual behaviour, and in tune with the general modus operandi of a normal sadomasochistic relationship and its variant practices.⁴¹⁷ The exposure of the Canadian community to the surge of BDSM centres available to adults and the promotion of such similar content in fictional portrayals inhabited multiple facets of society and proved to be yet another factor that eased public policy considerations toward a tolerance of the extreme and graphic sexual content of the ‘Eleven Videos’.⁴¹⁸ The court stressed that the prevalence of the porn industry, along with fictional films depicting adult sexual interactions that existed at a greater extremity than the ‘Eleven Videos’, were sufficient in illustrating that such content had reasonably impregnated the social demographics of the Canadian public at large based on the ease of the material’s accessibility.⁴¹⁹

The Provisional Court of British Columbia could not hold the ‘Eleven Videos’ as obscene material, as it was the current public policy of the Canadian society that had embedded similar behaviour in a measure of tolerance within its growing ambit. The nature of the harm that existed within the ‘Eleven Videos’, to the public at large, was not incompatible with the current standards of tolerance within the Canadian social demographic. The court noted that such was condoned based on the avalanche of the community-assessment factors. However, where extreme sexual conduct and violence are portrayed together, contradicting the tests created to assess societal tolerance and other state-protected rights, such material must be deemed immediately harmful to the public. Therefore, from the established tests, any material that depicts sexual practices as being degrading and dehumanising, shall fail the societal tolerance perspective test.

The *Price* case, as judicially exploratory and substantive for Canadian jurisprudence regarding the applicability of public policy to sadomasochism, did not promise the dissipation of all criminal charges over future sadomasochistic cases where actual, or serious, bodily harm

⁴¹⁷ Ibid at para 91.

⁴¹⁸ Ibid at para 99.

⁴¹⁹ Ibid at para 95.

occurs within Canada. The case is, as it should be remembered, a resoundingly positive application of the ever-changing societal norms to a generally scrutinised form of sexual expression.

3.4 South African Perspective

The strides of the English and Canadian courts in utilising the doctrine of public policy when critiquing a case involving actual, or serious, bodily harm from the practice of sadomasochism may serve as the architect of a South African's court inspiration if faced with a similar criminal law dispute. Even if a South African court is yet to hear such an acute criminal matter, the judiciary is still equipped with substantial legal aids of its own to effect a sound application of the doctrine of public policy to consensual activities that cause actual bodily harm, or greater. By virtue of the Constitution's transformative nature, and support from the existing judicial concepts, such as the *boni mores* and Ubuntu, a coherent analysis regarding public policy's tolerance of consensual sadomasochism may be synthesised.⁴²⁰

3.4.1 The *Boni Mores* Criterion

The supremacy of the Constitution of South Africa has ushered through a resounding judicial polymath of public convictions that weigh heavily upon the common law *boni mores* criterion.⁴²¹ The criterion has a predominant role in the South African law of delict, and also appears within the law of contract, yet such is not a readily applied doctrine within the criminal law. However, based on the consideration of harm upon the public, the *boni mores* is viewed as a suitable reference point for a South African court in assessing the nature of a consensual practice when juxtaposed to the policy considerations of the community at large.⁴²² To apply the wide-reaching ambit of the criterion, and its possible interpretation of consensual sadomasochism; its advent, definition, and purpose shall be explored. It is in inspiration of these considerations of public policy in light of the Constitution, which has seen the South

⁴²⁰ The Constitution of the Republic of South Africa.

⁴²¹ Ibid.

⁴²² Sharp 'A critical analysis of the role of the boni mores in the South African law of contract and its implications in the constitutional dispensation' (Masters thesis, University of KwaZulu-Natal, 2014), 7.

African legislature and Law Reform Commission make much-welcomed reforms in relation to, *inter alia*, the death penalty, the decriminalisation of sodomy, the legalisation of same-sex marriages, and the legalisation of substances such as cannabis.

The criterion dates back as early as second-century Roman law,⁴²³ where Roman men enjoyed a perpetual period of freedom of actions, save such freedom was limited to the boundaries created by the overarching quotidian morals of the community at large;⁴²⁴ coined the ‘*boni mores*’. The *boni mores* included both the legal convictions and moral affiliations of the community, infused with written and unwritten legal convictions; and any interaction that deviated from these standards were deemed as *contra bonos mores*.⁴²⁵ Zimmerman, assessing the definition of the *boni mores* by the Roman jurist Papinian, accounts for the historical perception as being:

*‘The sense of duty and the natural affection towards gods, parents or near relatives, the respect or esteem enjoyed by a person in society and the innate sense of shame: these are the types of values which had from ancient times held together the community at large, and which in their entirety constituted the unquestioned and self-evident core of the boni mores.’*⁴²⁶

Hence, the criterion strives for the preservation and upkeep of the morals of a particular community. Encumbered within this moral bracket lies the shared belief of public health, dignity, safety, and care.⁴²⁷

The validity of consensual sadomasochism can be scrutinised in light of the *boni mores* criterion, which is now embedded within the South African Constitution; as accounted for in the case of *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC*.⁴²⁸ The Supreme Court of Appeal noted that both the common law criterion, known as the *boni mores*, and the doctrine of public policy have become “deeply rooted” within the Constitution and its values.⁴²⁹

⁴²³ Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), 707.

⁴²⁴ Sharp ‘A critical analysis of the role of the *boni mores* in the South African law of contract and its implications in the constitutional dispensation’ (2014) 7.

⁴²⁵ J.D. Fine ‘Conspiracies *contra bonos mores*’ (1973) 19 *McGill Law Journal* 136 accounts for actions that are deemed *contra bonos mores* include, but are not limited to, public injury, corrupting of public morals, and prejudice to public welfare.

⁴²⁶ Zimmermann op cit note 423 at 711.

⁴²⁷ Sharp op cit note 424 at 8.

⁴²⁸ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours C* 2011 (3) SA 511 (SCA).

⁴²⁹ *Ibid* at para 22.

Thus, the validity of consent shall be *contra bonos mores*,⁴³⁰ or immoral, if the act in question extends beyond the threshold of the moral convictions of the community. The *boni mores* effectively limits one's autonomy where there are greater societal convictions in favour of the moral and legal order of the community. Therefore, based on the legal system of South Africa and its Roman-Dutch roots, the common law criterion is a prolific avenue to support the interpretation of public policy's weighting upon consensual sadomasochism.

Since consensual sadomasochism has no legal definition within the South African legislature, public policy's position within this issue, supported by the *boni mores* criterion, will serve as an avant-garde node for South African jurisprudence in defining the practice. The *boni mores* criterion stands as a historic and battle-hardened commander in projecting the morals of the current South African public and its eventual stance if consent to actual bodily harm by the practice of sadomasochism arises. South African courts will not permit the validity of the defence of consent to a practice that is *contra bonos mores*,⁴³¹ as was explored in chapter 2. This eclipses the individual autonomy of the participants to the practice and inevitably bolsters public policy considerations within South Africa in preventing against a practice that harms the fundamental morals of the community.⁴³² Thus, the doctrine of public policy, acting through the vessel of the *boni mores* criterion, sets an objective legal standard within South Africa that places the morals of the public above that of individual morals where harm occurs.⁴³³

The morals of the community stem heavily from the deep-rooted constitutional perspectives, especially by the portentousness of the Bill of Rights as the forerunner in South Africa's legal moralism. The Constitution conjures legal norms that tower as the archetypical forms of morality and offer clarity regarding the importance of specific human rights owed to the community of South Africa, reflecting the prevalence of the *boni mores* criterion once more.

The dearth of information regarding consensual sadomasochism in South Africa proves to restrict the *boni mores* criterion's full applicability. However, the consent of an individual to sexual violence to derive mutual gratification would ultimately focus on the violence itself as being *contra bonos mores*, as the act defiles the moral tenants of the constitutional society, being the infringement of bodily safety and security.⁴³⁴ The prevailing legal norms of morality,

⁴³⁰ A. Strode et al 'Boni mores and consent for child research in South Africa' (2015) 8 *SA Journal of Bioethics and the Law* 22.

⁴³¹ Ibid 23.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Section 12 of The Constitution of the Republic of South Africa.

in general, will inevitably be met by a fissure in the state's viewpoint on controlling violence between citizens, and on the other hand, the state's viewpoint in permitting consensual sexual intercourse between consenting adults. Violence in the public sphere, that is without 'social utility' or 'good reason', would be ancillary to the *boni mores*, however, Canadian law has made mention that the rise of BDSM and sadomasochistic content has grown exponentially in the contemporary society.⁴³⁵ The prevalence of BDSM culture exists within the confines of many Internet sites that are accessible within South Africa, highly deviant to the freedom of expression afforded within the Apartheid regime.⁴³⁶

The major driving force behind Internet censorship within South Africa is the Films and Publications Act,⁴³⁷ highlighting the criminalisation of child pornography that depicts an individual under the age of eighteen (18) performing sexual intercourse, participating in sexual acts, or exposing parts of their body that would classify as sexual exploitation.⁴³⁸ The Act broadly and substantively depicts the legislature's outlook on the sexual exploitation of children within the porn industry, yet makes no mention of adult pornographic depictions. This may be interpreted as a permitted form of publication within the public sphere, so long as the contents of publication are in line with the Constitutional cornerstones that echo the rights to personhood and is reflective of the *boni mores* of the country as a whole.

Therefore, where an adult pornographic video depicts the infringement of, *inter alia*, human dignity such would be divergent to the Act itself.⁴³⁹ The Act goes as far as classifying certain sexual depictions that infringe and degrade human dignity, and portray extreme violence, to be 'XX' depictions.⁴⁴⁰ Thus, the Act aims to instil the Constitutional perspectives of bodily safety, security, and integrity; whilst also projecting the safeguarding of children's rights and the criminalisation of any publication that would infringe such. Therefore, the moral convictions of the society (*'boni mores'*) of South Africa show a development in adult sexual expression, however, such is constructed upon a bedrock of constitutional perspectives, which seek to protect children from the nature of these publications.⁴⁴¹

⁴³⁵ See *Regina v Price* 2004 BCPC 0103.

⁴³⁶ S. Wolfaardt 'Submitting to the discipline of sexual intimacy? Online constructions of BDSM encounters' (Masters thesis, University of Pretoria, 2014), 10.

⁴³⁷ Films and Publications Act 65 of 1996.

⁴³⁸ See sections 1 and 2.

⁴³⁹ Section 16.

⁴⁴⁰ Section 16(4)(b).

⁴⁴¹ See Film and Publications Board "Report on Internet Usage and the Exposure of Pornography to Learners in South African Schools" (Houghton 2006).

The resonance of the *boni mores* criterion is capable of endorsing the current moral beliefs of the public at large by the evolution of the legal sphere that encapsulates its applicability. Therefore, where a matter arises which contradicts the proposed *boni mores* of the South African public, the courts would be best suited in considering each case upon its own merits within the guidance of current legislation and societal concerns that have evolved and developed concurrently to find a justifiable application of the criterion's worth.⁴⁴² The *boni mores* is thus not a separate moral creed that dictates a desired behavioural pattern from the public, rather, it is an assimilation of essential and 'everyday ethics' that endures as a commonality in all progressive legal systems.⁴⁴³

3.4.2 Ubuntu

In 1996, the implementation of the Constitution ushered South African customary law into the statutory reserve, tacitly implying that the notion of Ubuntu is capable of application, where applicable,⁴⁴⁴ by courts of the country.⁴⁴⁵ This exclusive South African jurisprudential concept is derived from the customary law, yet its definition is ambivalently defined to many authors.⁴⁴⁶ In an attempt to highlight the functionality of Ubuntu within the current constitutional age, viewpoints from prevalent authors and case law will determine the concept's gravity upon public policy.

Ubuntu may refer to an 'African' way of life; tempering the perspective that society itself must promote,⁴⁴⁷ *inter alia*, humaneness,⁴⁴⁸ human dignity, and equality; which are deemed to be intrinsic,⁴⁴⁹ rights irrespective of an individual's gender, race, health or status within the public.⁴⁵⁰ Like other constitutional concepts, which form moral and ethical bedrocks within the

⁴⁴² A.M. Louw 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' (2013) 16 *PER/PELJ* 90.

⁴⁴³ Mayer-Maly as cited in Sharp 'A critical analysis of the role of the boni mores in the South African law of contract and its implications in the constitutional dispensation' 9.

⁴⁴⁴ C. Himonga, M. Taylor, and A. Pope 'Reflections on judicial views of ubuntu' (2013) 16 *PER/PELJ* 373.

⁴⁴⁵ See section 211(3) of The Constitution of the Republic of South Africa.

⁴⁴⁶ J.Y. Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *PER/PELJ* 2.

⁴⁴⁷ S. Netshitombon 'Ubuntu: Fundamental constitutional value and interpretive aid' (Masters thesis, University of South Africa, 1998), 4.

⁴⁴⁸ Ibid 5.

⁴⁴⁹ T. Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 541.

⁴⁵⁰ Netshitombon op cit note 447.

public at large, the concept of Ubuntu is contained within the same viewpoint of applicability for all South Africans.⁴⁵¹ Hence, the allotment of the aforementioned definition proves that the concept may be implemented across the multifaceted legal sphere of South Africa, weaving together common notions from different cultural groups to promote a public standard of shared legal moralism. Based on its constitutional lineage, the concept of Ubuntu may be readily applied by a court to reflect the values and notions of the South African public to new and developing legal issues.⁴⁵² At its deepest root, the jurisprudential concept emphasises a reverberating policy consideration that strives to treat all members of the public with compassion and a respect to their inherent humaneness.⁴⁵³ Thus, it is apparent that Ubuntu is no mere principle of law; it is a concept that dictates a reputable and broad value system for a desired public standard of living.⁴⁵⁴

The pertinence of this exclusive African concept facilitates South African jurisprudence to create its own standard of public policy assessment, unique from that of England and Canada. The concept echoes, *inter alia*, that the right to human dignity within the public is paramount.⁴⁵⁵ The once elusive definition of Ubuntu may be illuminated to clearer heights in light of the constitutional and social prerogatives of maintaining and upholding human dignity.⁴⁵⁶ From a South African source of expected public conformity, the phrase '*Umntu ngumuntu nga bantu*' reflects the ethos of the concept.⁴⁵⁷ Thus, from this phrase alone, a holistic community perception of human dignity forms the basis of Ubuntu's extensive applicability.⁴⁵⁸

Therefore, the constitutional value of human dignity, contained in section 10 of the Bill of Rights,⁴⁵⁹ serves as a precinct for Ubuntu to the benefit of the South African public in its entirety. The relatively youthful constitutional democracy of South Africa allows for the blooming of the public's viewpoint on a shared notion of legal moralism.⁴⁶⁰ Therefore, any act that would infringe, *inter alia*, human dignity, or degrade its virtue, would be contrary to

⁴⁵¹ Himonga, Taylor, and Pope 'Reflections on judicial views of ubuntu' (2013) 380.

⁴⁵² Ibid 423.

⁴⁵³ Netshitombon 'Ubuntu: Fundamental constitutional value and interpretive aid' (1998) 4-5.

⁴⁵⁴ T.W. Bennett 'Ubuntu: An African equity' (2011) 14 *PER/PELJ* 47.

⁴⁵⁵ Netshitombon op cit note 453.

⁴⁵⁶ Mokgoro 'Ubuntu and the law in South Africa' (1998) 3.

⁴⁵⁷ See Netshitombon op cit note 453 at 5. *Umntu ngumuntu nga bantu* loosely translates as 'a person exists as a person based on what others within the community have done to challenge and inspire their self-actualisation, through social and public cornerstones.'

⁴⁵⁸ Ibid. It also accounts for the idiom '*Umntu akalahlwa*' which translates to 'A person cannot be thrown away'. This, once again, radiates the concept of the public respecting human life and maintaining human dignity.

⁴⁵⁹ Section 10 of The Constitution of the Republic of South Africa.

⁴⁶⁰ Himonga, Taylor, and Pope op cit note 451 at 372.

Ubuntu, based on its public convictions. This was prevalent in the first landmark case for the concept of Ubuntu's far-reaching applicability, and possibly the most notable of its panoply, being that of *S v Makwanyane*.⁴⁶¹

The case illustrated that even criminal conduct,⁴⁶² occasioning in murder within the public sphere, does not dehumanise and strip the perpetrator of their fundamental human rights when appearing before a court. Mokgoro J stressed the humaneness of what the concept of Ubuntu wished to enshrine within the Constitutional democracy of South Africa.⁴⁶³ Morality and the safeguarding of essential constitutional rights that define personhood appear to endure at the essence of public policy of South Africa.⁴⁶⁴ Therefore, Mokgoro J projects that human dignity and life cannot be diminutive within the Constitutional era of South Africa.⁴⁶⁵

Langa J adds weight to public policy's inspiration from the concept of Ubuntu, drawing upon the safeguards of human dignity and the sanctity of life within the public by the support of its shared values. Langa is of the opinion that a person within such a community-centric environment must also treat others within said community by the same measure of mutual respect and freedom they themselves are afforded.⁴⁶⁶ Therefore, there is a positive duty of care upon each individual within the South African public to realise, promote, and endorse the fundamental and essential rights that also belong to other members of the public.⁴⁶⁷ This is inspired from the inherent rights of personhood belonging to each individual within the public and a gleaming reflection of the age of Constitutionalism.⁴⁶⁸

Langa J further highlights that 'violent conflict' is sufficient to send shockwaves through the public domain, capable of rendering the members of the public to denounce that which the concept of Ubuntu wishes to enshrine, and possibly call for retributive punishment against the offender.⁴⁶⁹ However, the blood-stained history that pre-dates the liberation of the nation, which taints the memory of the Apartheid regime,⁴⁷⁰ unveils the torrential loss of human life in days past. It is evident, based on the cardinal nucleus of the Constitution itself,⁴⁷¹ that reconciliation

⁴⁶¹ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁴⁶² *Ibid*.

⁴⁶³ *Ibid* at para 307.

⁴⁶⁴ *Ibid* at para 307.

⁴⁶⁵ *Ibid* at para 308.

⁴⁶⁶ *Ibid* at para 224.

⁴⁶⁷ *Ibid* at para 224.

⁴⁶⁸ See Bennett op cit note 454 at 35.

⁴⁶⁹ Citing Justice Langa in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 225.

⁴⁷⁰ See Bennett op cit note 454 at 32.

⁴⁷¹ The Constitution of the Republic of South Africa.

and respect for the rights of even the ‘worst among us’ is a paramount juncture for the community as a whole to practice.⁴⁷² Therefore, it is submitted that the Constitutional inferences and safeguards may be extended to protect the rights of individuals who have committed unlawful acts.⁴⁷³

The existence of the death sentence is interpreted as ancillary within the new South African democracy and the values of the public at large; and so *S v Makwanyane* runs in the leagues of progressive judicious steps for the concept of Ubuntu and its characteristic of enshrining the right to life and human dignity within the public.⁴⁷⁴ To the Constitutional Court, even a criminal offender may not be stripped of their inherent constitutional rights, adhering to the public norms and values of the entire South African demographic at large.⁴⁷⁵ As noted by Netshitombon,⁴⁷⁶ Ubuntu’s involvement in the case of *S v Makwanyane* serves as an ‘extra textual-aid’ to the deciphering of fundamental human rights, contained within the Constitution, and ultimately serving as an unwavering benchmark for the essential standards within the South African legal and public systems.⁴⁷⁷

Evidently, by exploration of both the jurisprudential avenues and case law, Ubuntu expresses a moralistic aptitude within the South African legal system by significantly influencing public policy of the land in adopting its values of humaneness.⁴⁷⁸ Therefore, public morality is honed in a luminous glare of possibility within the concept’s vast application to fundamental human rights that are deemed inexhaustible. Metz,⁴⁷⁹ however, identifies that some viewpoints question the validity of certain considerations of Ubuntu as being deviant to public morality in the ever-growing public policy of South Africa.⁴⁸⁰ Metz outlines that in terms of public morality, the concept of Ubuntu may fail to achieve an outcome that is ‘publically-justifiable’ in the judicial decision-making process by the courts,⁴⁸¹ resulting in an indistinct formalisation of legality. In addition, the entrenched ‘collective community’ viewpoint of Ubuntu has come under scrutiny by the concept’s challenging of individual autonomy and freedom.⁴⁸² The notion

⁴⁷² Citing Justice Langa in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 229.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid 392.

⁴⁷⁶ Netshitombon ‘Ubuntu: Fundamental constitutional value and interpretive aid’ (1998) 12.

⁴⁷⁷ Ibid.

⁴⁷⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 307.

⁴⁷⁹ Metz ‘Ubuntu as a moral theory and human rights in South Africa’

⁴⁸⁰ Ibid 532.

⁴⁸¹ Ibid 533.

⁴⁸² Ibid.

of a collective community and shared morals is at the centre of the Constitution of South Africa.⁴⁸³ This is further emphasised by the hyper-accelerated notion of society's triumphant majoritarianism within the contemporary dynamic.⁴⁸⁴ Lastly, the public morality's purported diminishment by Ubuntu's conceptualisation may be due to its runic and ancient traditional origins, unfit for the ever-changing public frontier of a new South Africa.⁴⁸⁵ The salient driving force of the concept is its advocacy for the predominant values of the public by the protection of 'social and communal rights,'⁴⁸⁶ yet such may discriminate against the constitutionally enshrined individual dignity of certain members of the public through the concept's application.

To expect Ubuntu to be clearly defined, based on its multifaceted application through various spheres of South Africa, is a jaded refute to its developing legal pedigree.⁴⁸⁷ Clearer definitions of the concept are inevitably destined to surface through further judicial intrigue and contributions, and it is paramount to note that the South African public is not bound by a single, concrete definition of the concept, but open to its broad expanse.⁴⁸⁸ Ubuntu's chartering within public policy tugs at heartstrings of numerous constitutionally promised rights, but none more so than the over-arching safeguard upon the rights to life and dignity within the public.

The former president of the Republic of South Africa, Thabo Mbeki stated in his 2005 Heritage Day address:

*'We have not done enough to articulate and elaborate on what Ubuntu means as well as promoting this important value system in a manner that should define the unique identity of South Africans.'*⁴⁸⁹

The uniqueness of the concept allows for an assimilation of a multiracial and multicultural South Africa that instils the values of '*compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community.*'⁴⁹⁰ Ubuntu nonchalantly nudges those within the public to reveal their involvement within the community, projecting their humaneness and enriching the rights of those that share the social environment

⁴⁸³ Ibid.

⁴⁸⁴ R.N. Daniels and J. Brickhill 'The Counter-majoritarian difficulty and the South African Constitutional Court' (2006) 25 *Penn State International Law Review* 383.

⁴⁸⁵ Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 533.

⁴⁸⁶ Ibid.

⁴⁸⁷ Bennett 'Ubuntu: An African equity' (2011) 47.

⁴⁸⁸ Ibid.

⁴⁸⁹ Mbeki cited in Metz 'Ubuntu as a Moral Theory and Human rights in South Africa' (2011) 533.

⁴⁹⁰ M. Letseka 'In defence of ubuntu' (2012) 31 *Studies in Philosophy and Education* 54.

with them.⁴⁹¹ Therefore, the concept of Ubuntu strives to eradicate moral harm caused between community members by inspiring intrinsic humanitarian values within the public's recognition. In reflection, Ubuntu's influence over public policy in South Africa creates a unique and enduring model of human life and dignity by its zealous endeavour in inspiring wide-scale public compassion,⁴⁹² unity and kindness.⁴⁹³ This is paralleled to what the former president, Nelson Mandela, once said; rippling across the countless centuries yet to be:

*'For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others.'*⁴⁹⁴

3.4.3 'Living on a Thin Line' - The South African State's Prevention of Harm against the Public

The revelations of the *boni mores* criterion and the concept of Ubuntu shovels deep into the central jurisprudential focus of public policy within South Africa; unearthed as being the prevention of community harm and the maintenance of public morality. This is a shared notion for the jurisdictions of the England and Canada respectively, for both countries have relied upon the extension of the mutating principle of public policy when applied to this acute criminal law dispute.

South Africa's legal sphere has developed considerably by its nuanced deciphering of incidents that bring community harm of variant intensities that call for Constitutional guidance. Reflecting on the applicability of the South African Constitution, Section 12 guarantees the right to a person's bodily integrity, by virtue of the freedom and security of the body.⁴⁹⁵ This statutory safeguard highlights the State's deterrence of harmful conduct between persons in both the public and private sphere, entrenching firstly the freedom and security of an individual's body and secondly,⁴⁹⁶ preventing against the commission of bodily and

⁴⁹¹ *Sindane*, as cited in Letseka *ibid*.

⁴⁹² T.I. Nzimakwe 'Practising ubuntu and leadership for good governance: The South African and continental dialogue' (2014) 7 *African Journal of Public Affairs* 34.

⁴⁹³ Nkondo cited in Letseka 'In defence of ubuntu' (2012) 56.

⁴⁹⁴ N.R. Mandela *A Long Walk to Freedom: The Autobiography of Nelson Mandela* (1994).

⁴⁹⁵ Section 12 of The Constitution of the Republic of South Africa.

⁴⁹⁶ Section 12(1).

psychological harm.⁴⁹⁷ Therefore, any harm that would obliterate and infringe the freedom and security of a person's body and mind would be adverse to the constitutional provision.⁴⁹⁸

Section 12(1) (d) dictates that an individual may not be tortured in any way,⁴⁹⁹ as such practice is contradictory to the ethos of the Constitution and the policy considerations that have developed within the public of South Africa. The noteworthy enactment of the Prevention of Combating and Torture of Persons Act by the South African legislature is an offshoot of this provision.⁵⁰⁰ To the state, even though equipped with Constitutional safeguards and deterrents, torture was still prevalent in multiple facets of society.⁵⁰¹ To effectively prevent against the manifestation of torture, which brings physical and psychological harm unto the victims, the 'anti-torture Act',⁵⁰² facilitates for the identification of the fundamental human rights of the victim,⁵⁰³ and the administration of a sound prosecution against the perpetrator.⁵⁰⁴ The Act shows the progressive stance of the state in enacting legislation that safeguards against harm in both the public and private sphere from acts of torture by lending even greater legislative support to Constitutional imperatives.

The case of *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*,⁵⁰⁵ herein referred to as *Carmichele*, is a noteworthy submission regarding the obligation of developing the common law in line with the Bill of Rights. *Carmichele* also exposed the duty of care upon the State and its police service to prevent against the harm that would befall endangered minority groups within society.

Straying from the veil of facts of the case, and drawing attention upon the focal issues before the court; the duty of a court or tribunal to develop the common law,⁵⁰⁶ so that it runs in tune with the 'spirit, purport and objects of the Bill of Rights', is provided for under section 39(2).⁵⁰⁷ It is evident that the Bill of Rights is the keystone for the embodiment of the values of the Constitution, and in turn, the inspiration for the authority of public policy's standards. By virtue

⁴⁹⁷ Section 12(2).

⁴⁹⁸ Section 12.

⁴⁹⁹ Section 12(1)(d).

⁵⁰⁰ Prevention of Combating and Torture of Persons Act 13 of 2013.

⁵⁰¹ CSVR, "Torture in South Africa: The Act and the Facts" (2014).

⁵⁰² Prevention of Combating and Torture of Persons Act 13 of 2013.

⁵⁰³ Section 2(1)(a).

⁵⁰⁴ Section 2(1)(b).

⁵⁰⁵ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

⁵⁰⁶ Ibid at para 33.

⁵⁰⁷ Section 39(2) of *The Constitution of the Republic of South Africa*.

of this chain of influence, the Bill of Rights proves to influence the public's philosophy on human interaction and conduct. Thus, the common law of the land should reflect the ethos of the Bill of Rights in its entirety, and such may be facilitated by placing an obligatory mantle upon a court where the common law has deviated from the interests of justice.⁵⁰⁸ Therefore, where the common law reflects the Bill of Rights, it would manifest the principles of public policy, which is directly proportional to the Constitutional cornerstone.

The court also stressed the State's duty of care over its citizens in both the public and private sphere, especially to those that belonged to minority groups, such as women, children, and divergent sexualities. It is noted that the mere recollection of societal preferences and policies of the public are not sufficient to create a duty of care;⁵⁰⁹ rather, such is conjured where a defendant ought to have taken positive steps to protect and uphold their obligations to the plaintiff, by preventing against harm, or the infringement of such a plaintiff's essential constitutional rights.⁵¹⁰ The court also noted that via both national and international legislation,⁵¹¹ there was a positive duty of care upon the members of the South African police service to protect, *inter alia*, the public well-being, safety, and to prevent against crime and the upkeep of law and order.⁵¹² More so, the argument of the plaintiff accounted for women falling within a heightened niche of care for their safety and security,⁵¹³ owed by the state and its relevant protective bodies.

The decision in *Carmichele* reverberates the duty of care upon the South African state, and its police service, in mitigating the harm that might befall those at risk to constitutional infringement. Inevitably, this forces the state to take proactive steps in developing its own common law to propel the Constitutional rights to, *inter alia*, life and human dignity, which are inherent to all members of society.

Without evading section 39 of the Constitution, which played a paramount role in the inquiry of *Carmichele*, the provision itself caters for the relevant court to consider international or foreign law when interpreting the Bill of Rights.⁵¹⁴ This may strengthen a court's inquiry by taking judicial and legislative directions from corresponding judgements within international

⁵⁰⁸ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 4.

⁵⁰⁹ *Ibid* at para 42.

⁵¹⁰ *Ibid* at paras 42-43.

⁵¹¹ *Ibid* at para 62.

⁵¹² *Ibid* at para 61.

⁵¹³ *Ibid* at para 57.

⁵¹⁴ Section 39(1)(c) of The Constitution of the Republic of South Africa.

law. In addition, the court in Carmichele skilfully consulted section 173 of the Constitution, exposing that the Constitutional Court has inherent power to develop the common law within the interests of justice,⁵¹⁵ akin to the Supreme Court of Appeal and the High Court of South Africa. Thus, the potential of the Constitution, in preventing against harm to society's fundamental rights, can develop the common law harmoniously to the ethos of the Bill of Rights and the policy considerations of the public at large.

The case of *Masiya v Director of Public Prosecutions Pretoria (Centre for Applied Legal Studies, Amici Curiae)*,⁵¹⁶ herein referred to as *Masiya*, exists as a shining reflection of the state's development of the common law definition of crimes in order to create constitutional certainty and the combating of potential societal harm. *Masiya* stressed the need to develop and expand upon the common law definition of rape so that its actuality reflects the values of the constitutional order;⁵¹⁷ along with realising the current public policy considerations of preventing against harm within the community. Nkabinde J notes that the crime of rape is a recipient to severe judicial scrutiny.⁵¹⁸ This is based on the moral and social perspectives that observe the decay of the victim's constitutional rights of,⁵¹⁹ *inter alia*, bodily safety and security, dignity and equality.⁵²⁰ Nkabinde J expressed that the common law definition of rape should be developed to not only be restricted to the non-consensual vaginal penetration of a female victim by a male offender, but must also accommodate for the non-consensual anal penetration by a male offender. This stance supports the inherent rights to personhood, owed to the victim and forges a contemporary, constitutionally accepted definition within the public's interests of justice.

Langa CJ builds particularly in support of Nkabinde J's submissions, however, states the stifling of the common law definition of the crime demands a contemporary South African understanding. Langa CJ notes:

*'[F]irst that rape is about dignity and power and second, that anal rape is equivalent to vaginal rape.'*⁵²¹

⁵¹⁵ Section 173.

⁵¹⁶ *Masiya v Director of Public Prosecutions Pretoria (Centre for Applied Legal Studies, Amici Curiae)* CCT 54/06 [2007] ZACC 9.

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid* at paras 25-27.

⁵¹⁹ *Ibid* at para 27.

⁵²⁰ *Ibid* at para 27.

⁵²¹ *Ibid*, citing Langa CJ at para 78.

Langa CJ proposes that the crime of rape should also be extended to include the anal penetration of a male victim to be considered upon the same scale as that of a female victim. This judicial stride proposes that the Constitutional Court itself will holistically consider the equality of the citizens of South Africa, whilst upholding its duty to protect the public from mass infringement and harm by implementing a gender-neutral definition. Langa CJ's attempt at broadening the submissions of the court, and in facilitating the development of the common law, has embedded the public's safety as paramount within the Constitutional order of South Africa.⁵²²

Just as the case of *Carmichele* dealt with the constitutional alignment of inconsistent common law rules,⁵²³ *Masiya* follows along the daunting abbey of developing the common law of the land so that it reflects the spirit of the current South African legal position.⁵²⁴ To support the measures adopted in the aforementioned cases; the court, in *Du Plessis v De Klerk*,⁵²⁵ imports a Canadian viewpoint from the case of *R v Salituro*, which states the following:

*'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.'*⁵²⁶

The legislature serves as the primary forerunner at the heart for the law reform model of South Africa.⁵²⁷ However, even if the legislature stands at this legal equinox, the judiciary endures upon the battlefield of legal inquisition and cannot allow the common law to fall into a realm that is outside the current moral and societal pillars of the public.⁵²⁸

Section 171(1) of the Constitution, in invalidating any law,⁵²⁹ electrifies an appropriate court of inherent power or conduct,⁵³⁰ which is contradictory and inconsistent with the Constitution and its values. The aforementioned provision proves that the Constitutional artillery empowers an appropriate court to sever any contradictions that may infringe constitutional imperatives by seeking an order from the Constitutional Court.⁵³¹ This extreme measure was not adopted in the case of *Masiya*, for the common law definition of rape was not invalidated, rather, it was

⁵²² Ibid at para 80.

⁵²³ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

⁵²⁴ *Masiya v Director of Public Prosecutions Pretoria (Centre for Applied Legal Studies, Amici Curiae)* CCT 54/06 [2007] ZACC 9.

⁵²⁵ *Du Plessis v De Klerk* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658.

⁵²⁶ Citing Iacobucci J in *R v Salituro* (1992) 8 C.R.R. (2d) 173, as cited in *Masiya* supra at para 61.

⁵²⁷ J. Neethling, J.M. Potgieter, and T.J. Scott *Casebook on the Law of Delict* 5 ed. (2013) 12.

⁵²⁸ *Du Plessis v De Klerk* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (CC) at para 61.

⁵²⁹ Section 171(1) of The Constitution of the Republic of South Africa.

⁵³⁰ Section 173.

⁵³¹ Section 172(2)(a).

expanded upon so that the ‘spirit, purport and objects’ of the Bill of Rights could be observed.⁵³² The tapestry of legality, explored and developed within the case of *Masiya*, weaves with the thread of substantive review that the judiciary may implement in bringing the common law in line with the perspectives, values and morality of the current South African legal age.⁵³³

Ultimately, and after consideration of both *Carmcihele* and *Masiya*, the State allows for the judiciary to endorse the promised quintessence of the Bill of Rights in matters that deviate from this legal bedrock. In so doing, the judiciary may take proactive measures in preventing against the harm that might occur by developing, or striking away, the common laws that are inconsistent with the Bill of Rights and other paramount social and moral tenants. This legal advancement resonates in cognisance to the extent the South African judiciary, as empowered by the legislature, to act in the interests of justice and preventing against, *inter alia*, physical and psychological harm.⁵³⁴ By reconciling the concept of harm to legality, the judiciary of South Africa is equipped with an inventory of provisions that determine the extent of its involvement in matters that would infringe and cause ‘harm’ to the spirit, purport, and objects of the Bill of rights.⁵³⁵

3.5 Conclusion

The commentary of this chapter walked with legislative and judicial insight regarding the applicability of public policy to practices that would contradict the core values that invigorate a legal system. The hunt to find a clear footing of public policy in contemporary matters that bring consensual sadomasochism proves that the concept of public policy itself is an ‘arrow’, and a court merely draws upon a broad legal-quiver and fires where it sees fit. The practice of consensual sadomasochism, in light of the considerations of England and Canada, allows for the steady progression of the concept in the wake of the developing legislative incentives, social factors, and shared public values that influence a legal system.

English and Canadian precedents and legislation unmask the once monotonous and outdated judicial application of public policy and forces the relevant courts to apply the existing public

⁵³² Section 39(2).

⁵³³ *Masiya v Director of Public Prosecutions Pretoria* op cit note 524 para 31.

⁵³⁴ Section 12 of The Constitution of the Republic of South Africa.

⁵³⁵ Section 39(2).

policy upon its own merits, in the vigil of the public's exposure to a practice. The commonality throughout the three jurisdictions that were explored reveal that it is public policy's primary focus to prevent harm from befalling those within the State's protection and to bolster the values that are held dear by the greater public sphere. However, the extent of this consideration is influenced considerably by the changing moral and social fibres of the respective public itself, building an immunity to the once scrutinised and condemned behavioural forms that might have existed before the modern legislation and case law arose.

The legislative bodies of the respective jurisdictions and corresponding support from Law Reform Commissions appear to exist as a springboard in the retrospective critique of public policy and its involvement in a court's prosecution where consensual sadomasochism has occurred. At the summit of this investigation, the changing public policy considerations, impregnated by the influence of the porn industry and other media outlets, views sadomasochism in a less offensive manner based on its prevalence within the current international public domain. However, the harm that is inflicted within the sexual encounter, to both the participants and society respectively, is still a paramount consideration for a court's inquiry. Therefore, any infliction of harm that is deemed too severe and contradictory to the current public policy considerations would advocate for a prosecution of the consensual conduct.

The South African perspective of propelling public policy considerations takes an orthodox approach in deriving itself heavily from Constitutional entitlements; afforded to the individuals that populate both the public and private sphere. The *boni mores* criterion and the concept of Ubuntu serve as a codex in support of public policy by demanding the objective unification of public conduct that can be viewed as objectively justifiable. The South African considerations of public policy propose a momentous leap for the safeguarding of the public safety and the rights of the citizens that incubate the tethers of society. It is evident that the Constitution itself caters for the reform of the common law rules that would infringe the fundamental rights promised to citizens within both the public and private spheres.

Ultimately, this stance develops the common law so that it may reflect the South African Constitutional imperatives, and in turn, concurrently electrifies public policy's safeguarding against harm. Therefore, the South African perspective of protecting against public harm entrenches a heavy-rain of Constitutional supremacy that serves as the harbinger of the current public policy considerations by chartering the lengths of adaptive, internal legal development.

The criminalisation of consensual sadomasochism, by the implementation of public policy, may advocate that such a measure is a necessary stride in protecting society from widespread harm. However, this adoption may cause the prosecution to infringe the fundamental rights of the participants to the practice. At the heart of this finding, it appears that the individual autonomy rights of certain citizens will inevitably yield to the broader interests of the public. Therefore, the balancing-act of individual human rights against the interests of the State is in dire need of investigation.

CHAPTER 4: THE NASCENCE OF PERSONAL AUTONOMY AND OTHER PREVALENT HUMAN RIGHTS WITHIN THE INTERNATIONAL AND SOUTH AFRICAN LEGAL STANDARDS

'Autonomy... is freedom to develop one's self - to increase one's knowledge, improve one's skills, and achieve responsibility for one's conduct. And it is freedom to lead one's own life, to choose among alternative courses of action so long as no injury to others results.' - Thomas Szasz

4.1 Introduction

The roots of autonomy have existed since high antiquity and have endured in the pursuit of ascertaining a definition of its purport amongst jurists.⁵³⁶ The phenomenon of autonomy, if it may be deemed a 'phenomenon', is an inhabitant of other fundamental human rights such as privacy, freedom and security of the person, freedom of expression and the right to human dignity.

This chapter will explore the prevalence of the right to privacy and a justifiable invasion of a person's privacy by the State. In addition, the freedom of one's expression will be construed in light of autonomy's premise of 'self-governance' and its extensivity within the contemporary society. The concept of human dignity shall also be dissected within the objective and subjective construct of human desire and affiliation. The right to freedom of expression will be consulted and its correlation to consensual sadomasochism. Limitations of the aforementioned rights will be explored by considering the viewpoints of English and Canadian law as well as South African law. Lastly, the exploration of the inventory of autonomy rights shall provide a rubric of legal literature in determining the extent of the protection for the practice of consensual sadomasochism under these components.

⁵³⁶ D. van der Reyden 'The right to respect for autonomy Part I' (2008) 38 *South African Journal of Occupational Therapy* 27.

4.2 The Jurisprudential and Legal Automation of Autonomy

Immanuel Kant identified human autonomy as a factor that serves as a custodian for self-actualisation.⁵³⁷ Kant observes that all individuals possess autonomy,⁵³⁸ yet its true advent takes flight the moment an individual undergoes rational self-consciousness through personal experiences and interactions.⁵³⁹ This self-determination, embedded through personal understandings, perceived through one's very own senses, forms the bedrock of the Kantian principle of autonomy. In turn, Kant ignites the argument that an individual may be able to interpret moral values and respect legal authority imposed upon them only once they realise their personal autonomy, to the dispensation of the rational will.⁵⁴⁰ Therefore, the Kantian theory projects that autonomous behaviour is the reflection of personhood and exists as a supreme principle.⁵⁴¹

It is paramount to illustrate that autonomy cannot exist without the presence of an individual's personhood.⁵⁴² Personhood, and its inherent qualities,⁵⁴³ must be established as a precursor to autonomy's development, influencing the concept's applicability to human self-actualisation. Chapter three of this dissertation introduced the concept of personhood when delving through both the Constitution and the *boni mores* criterion within public policy, as is applicable within South African law.⁵⁴⁴ The rights that are inherently conferred upon the premise of personhood include, *inter alia*, dignity, freedom of expression and privacy.⁵⁴⁵ These are outlined in the Bill of Rights and serve as the pillars of focus for the duration of this chapter.⁵⁴⁶ These rights of

⁵³⁷ D.M. Williamson "Emotional intelligence and moral theory: A Kantian approach" (Doctoral Thesis, Vanderbilt University, 2009) 262.

⁵³⁸ C.F. Rostbøll 'Political theory - Autonomy, respect, and arrogance in the Danish cartoon controversy (2009) 37 *Sage Publications* 631.

⁵³⁹ M. Rohlf 'Immanuel Kant' *The Stanford Encyclopedia of Philosophy* (2018). <https://plato.stanford.edu/archives/sum2018/entries/kant/>, (accessed on 31 July 2018).

⁵⁴⁰ R. Johnson and A. Cureton 'Kant's moral philosophy' *The Stanford Encyclopedia of Philosophy* (2018). <https://plato.stanford.edu/archives/spr2018/entries/kant-moral/>, (accessed on 31 July 2018).

⁵⁴¹ Rostbøll op cit note 538 at 632.

⁵⁴² T.M. Rossouw "Identity, Personhood and Power: A Critical Analysis of the Principle of Respect for Autonomy and the Idea of Informed Consent, and Their Implementation in an Androgynous and Multicultural Society" (Doctoral Thesis, Stellenbosch University 2012) 96.

⁵⁴³ Ibid 62.

⁵⁴⁴ The Constitution of the Republic of South Africa.

⁵⁴⁵ J.M. Burchell 'The legal protection of privacy in South Africa: A transplate hybrid' (2009) 13 *Electronic Journal of Comparative Law* 2.

⁵⁴⁶ Sections 10, 14 and 16 of The Constitution of the Republic of South Africa.

personhood influence the development of a person's identity and set in motion the possible legal formulation and recognition of personal autonomy.⁵⁴⁷

The term 'autonomy' endures in prevailing perpetuity within our current age,⁵⁴⁸ encompassing a spectrum of differing perspectives within spheres of applicability in society. The essence of the concept of autonomy dictates the self-governance of an individual to his or her own whims and desires. Jordaan observes the breakdown of the term from its Greek origins,⁵⁴⁹ 'auto' (self) and 'nomos' (law).⁵⁵⁰ Evidently, the conjoining of these terms forms the theory of 'self-law', one that is imposed by individual persons over their own actions, constituting personal 'self-actualisation',⁵⁵¹ and the manifestation of free will.⁵⁵² This enforces the internal and personal dominium that a person has over their body and mind, free from the hindrances of external influences.⁵⁵³ McQuoid-Mason notes that in medical law,⁵⁵⁴ patient autonomy is an integral consideration within the doctor-patient relationship. He notes further that the ethical command and legality of the autonomous decisions of patients must be 'informed, independent, and respected'.⁵⁵⁵ Rossouw,⁵⁵⁶ *inter alia*, accounts for a patient's autonomy as being the authority of said patient in exercising their informed consent regarding their medical interactions.⁵⁵⁷ Therefore, the objective assessment of a person who exhibits the direction and appreciation of their personal actions shall constitute a reflection of autonomy.⁵⁵⁸ Autonomy proves to be existent in those who can exhibit the ability to appreciate the nature of their actions.⁵⁵⁹

⁵⁴⁷ S.J. Cornelius 'Commercial appropriation of a person's image: *Wells v Atoll Media (Pty) Ltd* (Unreported 11961/2006) [2009] Zawchc 173 (9 November 2009)' (2011) 14 *PER/PELJ* 193-95, projects the viewpoint that 'identity' is an infusion of distinct rights of personhood, specifically dignity and privacy.

⁵⁴⁸ H. Hannum and R.B. Lillich 'The concept of autonomy in international law' (1980) 74 *The American Journal of International Law* 585.

⁵⁴⁹ D.W. Jordaan 'Autonomy as an element of human dignity in South African case law' (2009) 9 *The Journal of Philosophy, Science & Law* 4.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² J. Coggon and J. Miola 'Autonomy, liberty, and medical decisionmaking' (2011) 70 *Cambridge law Journal* 525.

⁵⁵³ Van Der Reyden 'The right to respect for autonomy Part I' (2008) 27.

⁵⁵⁴ D. McQuoid-Mason 'Michael Jackson and the limits of patient autonomy' (2012) 5 *SA Journal of Bioethics & Law* 11.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Rossouw 'Identity, Personhood and Power: A Critical Analysis of the Principle of Respect for Autonomy and the Idea of Informed Consent, and Their Implementation in an Androgynous and Multicultural Society' (2012) 97.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ See Van der Reyden 'The right to respect for autonomy Part II' (2008) 38 *South African Journal of Occupational Therapy* (2008) 18 that accounts for the Codes of Ethics of the World Federation of Occupational Therapists (WFOT), addressing the considerations of patient autonomy to occupational therapy.

⁵⁵⁹ Coggon and Miola 'Autonomy, liberty, and medical decisionmaking' (2011) 524.

Autonomy, as a human right, is not expressly contained within the South African Constitution,⁵⁶⁰ but rather, its existence is implied by the characteristics of specific rights to personhood, as outlined within the Bill of Rights.⁵⁶¹ The extent of a person's autonomy, however, is not absolute within the confines of a democratic republic, such as South Africa. Section 36(1) of the Bill of Rights expressly provides for the limitation to rights of personhood if such is performed in a manner that is reasonable and justifiable.⁵⁶² In addition, where such a limitation of fundamental rights is desired by a court, the nature of the limitation must take into account the considerations of 'human dignity, equality, and freedom' that exist within the open and democratic republic of South Africa.⁵⁶³ When attempting to limit fundamental rights, a court must be alive to:

- '(a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.⁵⁶⁴

This provision serves as a testament of the South African legislature's steps in controlling a person's freedom of autonomy by following a justifiable limitation process within an open and democratic society. This consideration of an 'open and democratic society', which facilitates for individuals to express personal autonomy, was explored by Ackermann J in the case of *Ferreira v Levin NO; Vryenhoek v Powell NO* (herein referred to as *Ferreira*).⁵⁶⁵ Ackermann J observes that the concept of an 'open society' suggests,

'[T]hat individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfilment and their own conception of the "good life"'.⁵⁶⁶

This viewpoint from Ackermann J in *Ferreira* paves the foundations for autonomy's developing consideration within the South African legal sphere and the respect afforded to

⁵⁶⁰ See *S v Jordan (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002) at para 52.

⁵⁶¹ Chapter 2 of The Constitution of the Republic of South Africa.

⁵⁶² Section 36(1).

⁵⁶³ Ibid.

⁵⁶⁴ Section 36(1)(a) - (e) of *ibid.*

⁵⁶⁵ *Ferreira v Levin NO; Vryenhoek v Powell NO* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995).

⁵⁶⁶ At para 50.

corresponding human rights, inherent to all persons.⁵⁶⁷ Even though Ackermann J, as noted by Jordaan,⁵⁶⁸ makes no express mention of the word ‘autonomy’ in his stance, such is still a pivotal leap for this period of South African case law in entrenching the concept as an avenue of inquiry by a court in relevant human rights matters. The assertion that an individual has the freedom to mould his or her very own personal development in the direction of the life they wish to lead is a testament to the consideration of the freedom of autonomy.⁵⁶⁹

Consent has been explored within Chapter two of this dissertation and its elements and fundamentals shall not be revisited here. However, the very element of consent facilitates for the blossoming of autonomy, based on the notion of individual freedom. The landmark judgement on consensual sadomasochism in *R v Brown* proposed that the concept of autonomy is very much alive within the consideration of the criminal law jurisprudence.⁵⁷⁰ However, consent to bodily harm, which brings varying degrees of physical harm, may limit the extension of one’s personal autonomy where one indulges in acts of sadomasochism that causes (what the law and *boni mores* consider as) prohibited degrees of bodily harm.⁵⁷¹ As expressed in Chapter two, this has been accepted by the general viewpoint of both English and Canadian courts as the materialisation of actual bodily harm.

The South African case of *Barkhuizen v Napier* contemplates the freedom of one’s autonomy within the law of contract,⁵⁷² which can be extenuated to the criminal law’s outlook as well. Ngcobo J identifies that autonomy may be defined as:

*‘[T]he ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.’*⁵⁷³

What is noteworthy from this submission is that freedom of autonomy and freedom as a broader human right are two distinct conceptions. A person may be imbued with the Constitutional right to freedom, yet the extent of his or her autonomy may restrict the enjoyment and expenditure of such freedom. However, the virtue of personal autonomy caters for an individual to expend their freedom, even if such is to their ‘own detriment,’⁵⁷⁴ based on their personal

⁵⁶⁷ Ibid.

⁵⁶⁸ Jordaan ‘Autonomy as an element of human dignity in South African case law’ (2009) 5, 6.

⁵⁶⁹ *Ferreira v Levin NO; Vryenhoek v Powell NO* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) at para 50.

⁵⁷⁰ *R v Brown* [1994] 1 AC 212.

⁵⁷¹ Arnold ‘Vagueness, autonomy and *R v Brown*’ (2015) 103.

⁵⁷² *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007).

⁵⁷³ At para 57.

⁵⁷⁴ Ibid.

will. This concept of personal will to the freedom of contract bolsters the Constitutional prerogatives of human dignity,⁵⁷⁵ and supports that autonomy is a facet of dignity within the South African viewpoint.⁵⁷⁶

The South African Constitution does not expressly mention the right to autonomy, yet its definition may be inferred from specific rights that are inherent to personhood. The case of *NM v Smith* shows that:⁵⁷⁷

*'[By] recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom.'*⁵⁷⁸

Therefore, the right to freedom of expression,⁵⁷⁹ and its overlap with human dignity and privacy, treads hand-in-hand with the concept of autonomy. The Constitution projects its inherent understanding that persons do not endure as mindless husks, rather, they inhabit bodies that exist within communities of South Africa.⁵⁸⁰ This highlights that the conduct expressed by these persons, derived from their inherent rights of personhood, shall be specifically driven by their personal will, and not by the influence of the State, or any other external source.⁵⁸¹

Jordaan expresses a reflective commentary on the case of *NM v Smith* by highlighting the communal,⁵⁸² or 'socially integrated',⁵⁸³ measure of autonomy within the South African legal sphere. It is observed that the measure of an individual's personal pursuits,⁵⁸⁴ within the 'overall framework' of the democratic society of South Africa,⁵⁸⁵ serves as a developing conception of a court to the freedom of autonomy as a whole.⁵⁸⁶ This positive action by the legislature in

⁵⁷⁵ Section 10 of The Constitution of the Republic of South Africa.

⁵⁷⁶ *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) at para 150.

⁵⁷⁷ *NM v Smith* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (4 April 2007).

⁵⁷⁸ *Ibid* at para 145.

⁵⁷⁹ Section 16 of The Constitution of the Republic of South Africa.

⁵⁸⁰ See *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC) (9 October 1998) at para 117.

⁵⁸¹ *Ibid*.

⁵⁸² *NM v Smith* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (4 April 2007).

⁵⁸³ Jordaan 'Autonomy as an element of human dignity in South African case law' (2009) 7.

⁵⁸⁴ See *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) at para 57.

⁵⁸⁵ *NM v Smith* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (4 April 2007). at para. 131.

⁵⁸⁶ Jordaan 'Autonomy as an element of human dignity in South African case law' (2009) 7.

conferring such fundamental human rights propels the inherency of autonomy within the greater social sphere.⁵⁸⁷

4.3 Relevant International Instruments of Human Rights and other Supporting Pieces of Legal Literature

4.3.1 Universal Declaration of Human Rights

The atrocities that were committed against human life before and during World War II lingered in ongoing debates as a pale reflection of the possible path of destruction humankind could embark upon if not fully dedicated to a universal credo of morals and principles that respect human rights.⁵⁸⁸ The General Assembly of the United Nations put forward the Universal Declaration of Human Rights (herein referred to as the 'UDHR') in the year 1948,⁵⁸⁹ serving as an overarching contemporary *Magna Carta* of inexhaustible human rights of the modern world.⁵⁹⁰

The UDHR strategically worked as a legal 'grimoire' of reassurance in entrenching and propelling shared values of human rights within the international legal spheres of the world. The paramount focus of the UDHR is hinged predominantly upon the inherent human dignity and individualistic self-worth of each human within a free and protected society.⁵⁹¹ There is thus a positive obligation upon each supporting nation, along with its organs of state, to promote the values and purport of what the Declaration seeks to instil.⁵⁹² Glendon describes the UDHR as being:

*'[A] yardstick by which nations and peoples can measure their own and each other's progress.'*⁵⁹³

⁵⁸⁷ Ibid 8.

⁵⁸⁸ This is in reference to the Holocaust and the establishment of 'concentration camps' by Nazi Germany, furthering the detaining and mass murder of political opponents and the Jews of Europe.

⁵⁸⁹ UN General Assembly "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948).

⁵⁹⁰ John, King of England, agreed to the Magna Carta in 1215, stating, *inter alia*, that Kings of England shall respect the rights of all individuals within their dominium, along with the support of the country's laws to safeguard its citizens.

⁵⁹¹ See *preamble* of UN General Assembly, "Universal Declaration of Human Rights" 217 (III) A (1948).

⁵⁹² Ibid.

⁵⁹³ M.A. Glendon 'The rule of law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern Journal of International Human Rights* 4.

Such is a simplistic, yet far-reaching submission as to the strength of the Declaration's unification of a shared international perspective of the preservation and upkeep of human rights.⁵⁹⁴ The thirty Articles that populate the UDHR serve as forerunners to the rights of, *inter alia*,⁵⁹⁵ freedom, safety, privacy, and dignity for all humans of the world.⁵⁹⁶ The Declaration goes as far as to accommodate for both the social and economic rights of a person respectively.⁵⁹⁷

It is essential to note that the Declaration has no binding effect upon the legal vocation of the nations that abide by its principles;⁵⁹⁸ its premise is simply to endorse a collective understanding of the shared values to human rights across the world. A testament to the gravity of the Declaration is evident within the numerous constitutions of the nations that are supporters of its ambit. Fundamental elements such as the right to life, liberty and security of the person,⁵⁹⁹ freedom from slavery and forced servitude,⁶⁰⁰ restrictions upon torture and inhumane practices,⁶⁰¹ equality,⁶⁰² and the right to privacy and freedom from an arbitrary interference,⁶⁰³ have found themselves within the reverberating certainty of constitutional support from the nations to the Declaration⁶⁰⁴.

4.3.2 European Convention on Human Rights

Deriving itself from the influence of the UDHR, the European Convention on Human Rights (herein referred to as the ECHR) exists as a supporter of the upkeep and protection of human rights within Europe.⁶⁰⁵ The ECHR states that the member-nations to the Convention are under a positive obligation to realise and respect the human rights of all persons within their

⁵⁹⁴ UN General Assembly "Universal Declaration of Human Rights" (1948).

⁵⁹⁵ See Articles 3, 4, 5 and 12 of the Universal Declaration of Human Rights.

⁵⁹⁶ E.D. Re 'The Universal Declaration of Human Rights: Effective remedies and the domestic courts' (2003) 33 *California Western International Law Journal* 142.

⁵⁹⁷ See Articles 14, 22, 23 and 26 of the Universal Declaration of Human Rights.

⁵⁹⁸ Glendon 'The rule of law in the Universal Declaration of Human Rights' (2004) 5.

⁵⁹⁹ Article 3 of the Universal Declaration of Human Rights.

⁶⁰⁰ Article 4.

⁶⁰¹ Article 5.

⁶⁰² Article 2.

⁶⁰³ Article 12.

⁶⁰⁴ Glendon 'The rule of law in the Universal Declaration of Human Rights' (2004) 5, 12.

⁶⁰⁵ Council of Europe "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950).

jurisdiction.⁶⁰⁶ This first Article paints a supportive mirroring of the UDHR's premise, allowing for the flowering of a unified understanding of all nations to the Convention.

The European Court of Human Rights (herein referred to as the ECtHR) was established under Article 19 of the Convention,⁶⁰⁷ creating a permanent court that serves as the highest front to the access of justice in matters of human rights violations. The ECtHR may hear any matter that brings forward flourishes of human rights violations within any of the member states that are party to the Council of Europe.⁶⁰⁸ This proves that the Convention is far more herculean than a mere credo of desired treatment by governments over people, but rather, the Convention forms a multi-faceted legal outlook on the safety and enforcement of fundamental and protected human rights.⁶⁰⁹

The progressive value of the Convention entrenches, even if not openly expressed,⁶¹⁰ the facilitation for the access to justice where human rights violations have occurred.⁶¹¹ Therefore, the ECtHR thrives as a manifestation of the will of the ECHR, serving as an instrument for the safety and upkeep of human rights. Ultimately, the ECtHR endures as a descendant of the UDHR, based on the latter's resounding influence upon the consideration of human rights within the modern world.

4.3.3 The South African Constitution

The Constitution exists as the supreme law within the South Africa and binds together an array of fundamental legal tenets.⁶¹² Under Chapter 2 of the Constitution, the Bill of Rights endorses the fundamental human rights of all South Africans in a distinctive outline. For the fulfilment of this chapter's focus, only corresponding rights contained within the Bill of Rights shall be expressed in the hopes of propelling the eventual South African perspective to consensual sadomasochism that brings harm upon the participants.

⁶⁰⁶ Article 1.

⁶⁰⁷ Article 19.

⁶⁰⁸ Article 34.

⁶⁰⁹ J.H. Gerards and L.R. Glas 'Access to justice in the European Convention on Human Rights system' (2017) 35 *Netherlands Quarterly of Human Rights* 15.

⁶¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶¹¹ Gerards and Glas op cit note 609 above at 13.

⁶¹² The Constitution of the Republic of South Africa.

As an introductory submission of the pertinence of the Bill of Rights, Section 7 states that:

‘(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

*(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*⁶¹³

This submission vigorously establishes South Africa’s support of human rights by allowing for the Bill of Rights to shine on as an instrument of prominence. The rights of freedom, equality, and dignity,⁶¹⁴ resurface as common threads to the UDHR’s primary outlook upon human rights, proving⁶¹⁵ that the Bill of Rights is a noteworthy standard-bearer of the Declaration.⁶¹⁶ Section 7(2) of the Bill of Rights places a positive obligation upon the South African state to safeguard and facilitate the fundamental rights of the Bill of Rights that are inherent to every person.⁶¹⁷ Once again, such echoes the South African Constitution’s resounding compliance with yet another international standard of care for the sanctity of human rights of all persons. Thus, the Bill of Rights can be held as the custodian for the democratic age of South Africa by its initiative of enshrining the fundamental rights of all persons in South Africa by means of a supreme legislative authority.⁶¹⁸

However, a noteworthy consideration regarding the Bill of Rights is the previously mentioned ‘Limitations Clause’.⁶¹⁹ As accounted for earlier, Section 36 allows for the limitation of human rights, where such is ‘reasonable and justifiable’,⁶²⁰ within an open and democratic society.⁶²¹ The Bill of Rights thus expressly provides for a mechanism of control of certain human rights, juxtaposed objectively to the limitation of such. The term ‘reasonable and justifiable’ treads within a defined Constitutional test for the possible limitation of a human right by an appropriate court.⁶²² Such is a delicate task as the test itself is strict within its definitional

⁶¹³ Section 7(1) - (3).

⁶¹⁴ Section 7(1).

⁶¹⁵ Universal Declaration of Human Rights.

⁶¹⁶ Ibid.

⁶¹⁷ Section 7(2) of The Constitution of the Republic of South Africa.

⁶¹⁸ Ibid.

⁶¹⁹ See sections 7(3) and 36.

⁶²⁰ Section 36.

⁶²¹ Section 36(1).

⁶²² Ibid.

ambit.⁶²³ If the court were to implant the limitations clause, such will expose the harm of the limitation upon the individual's right, and on the other end of the spectrum, the importance in the protection of the public benefit and interests regarding the limitation.⁶²⁴ O'Regan J considered the intensity of an intervention by an appropriate court when assessed to different matters calling for the limitations of rights:

*'The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.'*⁶²⁵

The proportionality between the right that is limited, and such a limitation's benefit to the broader and more compelling concerns of the state, must be objectively constructed within the relevant grounds of Constitutional justification. From a theoretical point of view, the limitations clause bolsters the implementation of the law of general application, following set and authorised legal norms that may limit a right contained within the Bill of Rights; provided that such is *'reasonable and justifiable within an open and democratic society based on human dignity, equality and freedom.'*⁶²⁶

Therefore, individual human rights within the South African legal system are bestowed by a Constitutional certainty, yet the absolute nature of such are far from concrete in light of the existence of the 'Limitations Clause within the Bill of Rights.'⁶²⁷ Consensual sadomasochism that brings certain degrees of harm upon a person involves the entanglement of specific personality rights that must be examined. For the duration of this chapter, the rights to privacy,⁶²⁸ dignity,⁶²⁹ and freedom of expression shall be explored in their broader definitions and their specific roles within a consensual sadomasochistic encounter.⁶³⁰

4.4 The Right to Privacy

⁶²³ I.M. Rautenbach 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17 *PER/PELJ* 2242.

⁶²⁴ *Ibid* 2250.

⁶²⁵ O'Regan J in *S v Bhulwana, S v Gwadiiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995) at para 18.

⁶²⁶ The Constitution of the Republic of South Africa.

⁶²⁷ Section 36(1).

⁶²⁸ Section 14.

⁶²⁹ Section 10.

⁶³⁰ Section 16.

Aside from its existence within precursor international human rights instruments, such as the UDHR,⁶³¹ the right to privacy is an on-going and ever-developing virtue across multiple legal systems within the current age. Within the South African Constitutional framework, privacy can be viewed as a realm of liberty⁶³² for each individual person, moulding a perspective of personal autonomy and freedom within the ambit of the right itself. This, however, is a mere superficial definition of privacy within its Everest-like conceptualisation.

The UDHR accommodates for a person's right to privacy in Article 12, expressing that no arbitrary interference may infringe such a personality right.⁶³³ However, Van der Bank notes that the right to privacy,⁶³⁴ even if promised within the legal ethers of many jurisdictions, proves to be far from absolute. The focus of 'privacy's end', or its limitation, shall be a driving focus of this subchapter.

Under the arch of Section 14 of the Bill of Rights, nestled within the Constitution,⁶³⁵ all persons have the right to privacy and its corresponding safeguards.⁶³⁶ The right to privacy seeps into the corresponding perspective of individual freedom and the virtue of human dignity being upheld within an open and democratic State.⁶³⁷ Cheung,⁶³⁸ by virtue of this submission, asserts that dignity is 'part and parcel' to privacy and should be recognised as an interconnected personality right.⁶³⁹ These Constitutional rights exist separately, yet conjoined by the links of personal autonomy of the individual. The right to privacy, forming a unique and individualistic flourish across one's individualistic personality, is broadly interpreted into multiple definitions depending on the contextual viewpoint of the word and its application.⁶⁴⁰ Townsend identifies that the reach of the right to privacy encompasses, *inter alia*, the exclusiveness of:

⁶³¹ Universal Declaration of Human Rights.

⁶³² Rossouw "Identity, Personhood and Power: A Critical Analysis of the Principle of Respect for Autonomy and the Idea of Informed Consent, and Their Implementation in an Androgynous and Multicultural Society" (2012) 184.

⁶³³ Article 12 of the Universal Declaration of Human Rights.

⁶³⁴ See C. Van der Bank 'The right to privacy - South African and comparative perspectives' (2012) 1 *European Journal of Business and Social Sciences* 78.

⁶³⁵ Section 14 of The Constitution of the Republic of South Africa.

⁶³⁶ Ibid.

⁶³⁷ A. da Veiga and P. Swartz 'Personal information and regulatory requirements for direct marketing: A South African insurance industry experiment' (2017) 108 *South African Institute of Electrical* 56.

⁶³⁸ A.S. Cheung 'Revisiting privacy and dignity: Online shaming in the global e-village' (2014) 2 *Laws - MDPI* (2014).

⁶³⁹ Ibid 302, 306, 310, 320.

⁶⁴⁰ da Veiga and Swartz op cit note 637 above at 56-57.

*'[T]he physical space around a person, freedom of thought, control over one's body and information about oneself, and the right to make private decisions without interference.'*⁶⁴¹

Townsend's tacitly implies the interconnected nature of autonomy to the enjoyment of the right to privacy.⁶⁴² Townsend further sheds light on the three classifications of privacy, the first of which is physical privacy.⁶⁴³ This may also be referred to as 'spatial' privacy,⁶⁴⁴ allowing an individual to relish in the freedom of their personal space to the exclusion of others. A common example of such is a person enjoying the solitude of their personal home without an unwarranted intrusion by another. Secondly, Townsend identifies decisional privacy as being another pillar to the right.⁶⁴⁵ This entails that the consideration of privacy exists in the decision-making process of all persons and their ability to render an effective and independent 'self-defining decision',⁶⁴⁶ without external or 'rear-window' input. Thirdly, the final facet to privacy's expansive definition includes for informational privacy.⁶⁴⁷ This is coined as 'personal data' and various jurisdictions have implemented legislative controls to safeguard the use, dissemination, and publication of such content.⁶⁴⁸ The reasonable expectation of control and protection over the personal data of an individual, by one who is in possession of such content, depends significantly on the nature of the data and the content of its information.⁶⁴⁹ Along the string of variant nodes of personal data that exist in recognised forms of classification, those that appear to be pivotal in terms of data protection and security are, *inter alia*, the name, age, financial position, and any identifiable photographs of a person.⁶⁵⁰

The three classifications of the right to privacy are entwined in a categorisation of similarity and complimentary worth. As noted by Townsend,⁶⁵¹ without an over-arching definition of privacy, the flexibility of the right's interpretation may take multiple forms of inquiry where individualistic scenarios bring a dispute regarding privacy rights. It is clear that individual autonomy runs in an unhindered footing within the right to privacy, proving to be connected

⁶⁴¹ B.A. Townsend "Privacy and Data Protection in Ehealth in Africa: An Assessment of the Regulatory Frameworks That Govern Privacy and Data Protection in the Effective Implementation of Electronic Health Care in Africa: Is There a Need for Reform and Greater Regional Collaboration in Regulatory Policymaking?" (Doctoral Thesis, University of Cape Town, 2017) 48.

⁶⁴² *Ibid.*

⁶⁴³ *Ibid* 50.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid* 51.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

⁶⁴⁸ da Veiga and Swartz op cit note 637 above at 59.

⁶⁴⁹ Townsend op cit note 641 above at 51.

⁶⁵⁰ Edwards as cited in Townsend.

⁶⁵¹ *Ibid.*

with the right's inherent purport.⁶⁵² By the exploration of the 'three pillars of privacy', it is noteworthy to observe that the right seeks to deter against invasions into the personal space of an individual, regardless if such occurs within the private or public sphere.⁶⁵³ Furthermore, the right to privacy acts as an artefact of legal certainty in the hopes of curtailing the publication, and dissemination,⁶⁵⁴ of unauthorised personal information held by another.⁶⁵⁵

The Canadian pieces of relevant legislation that deal with the right to privacy are the Privacy Act,⁶⁵⁶ and the Personal Information Protection and Electronic Documents Act respectively.⁶⁵⁷ The Privacy Act seeks to assert the definition of personal information, arriving at a juncture of such content being '*information about an identifiable individual*.⁶⁵⁸' The Act thus endorses the safeguard over private information that may be linked to an identifiable person by the implementation of a list of noted forms that such information may take.⁶⁵⁹ The Act expressly allows a person to claim access to information belonging to them,⁶⁶⁰ held by the Canadian government.⁶⁶¹ This accommodation is a testament to a person's right to privacy in Canada, achieving the lengths of compelling the State to comply with such provisions where personal information is concerned.

The case of *R v J.A* tested the concept of privacy and autonomy that existed within adult sexual relationships within Canada. The Supreme Court of Canada noted that:⁶⁶²

*'Respect for the privacy and sexual autonomy of consenting adults has long been embraced by Parliament as a fundamental social value and an overarching statutory objective: Keeping the state out of the bedrooms of the nation is a legislative policy, and not just a political slogan.'*⁶⁶³

The Court, however, was alive to the consideration that the right to privacy is not etched in absoluteness.⁶⁶⁴ The Court allowed for physical and decisional privacy to take flight between adult sexual partners, as such is a manifestation of personal autonomous will.⁶⁶⁵ The Court also

⁶⁵² See section 14 of The Constitution of the Republic of South Africa.

⁶⁵³ Townsend op cit note 641 above at 50.

⁶⁵⁴ Ibid.

⁶⁵⁵ 'Personal information' in this context relates to information that belongs to a person, considered vital and important.

⁶⁵⁶ Privacy Act R.S.C., 1985, C. P-21.

⁶⁵⁷ Personal Information Protection and Electronic Documents Act S.C. 2000, C. 5.

⁶⁵⁸ See definitions of the Privacy Act R.S.C., 1985, C. P-21.

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid.

⁶⁶² *R v J.A.* 2011 SCC 28.

⁶⁶³ Ibid at para 116.

⁶⁶⁴ Ibid at para 115.

⁶⁶⁵ Ibid at para 114.

agreed that private consensual sexual behaviour between adults should not be the recipient of prying eyes from the State. However, an intrusion into the private realm of adult interaction may be permitted where the activity that is practised brings a significant degree of bodily harm,⁶⁶⁶ exposing a reasonable and justifiable limitation upon the right to privacy.⁶⁶⁷

The position of English law also adds valuable weight to the assessment of the right to privacy from an intentional outlook. The significance of the Human Rights Act fostered the development of the country's legislation,⁶⁶⁸ in line with the ethos of the European Convention on Human Rights.⁶⁶⁹ Within this structural legislative framework,⁶⁷⁰ the right to privacy is realised as an essential personality right that is deserving of respect. Article 8 of the Act,⁶⁷¹ affords for the respecting of the privacy of all individuals within their private and family life,⁶⁷² to the exclusion of unwarranted intrusions and interferences⁶⁷³. However, even with such a laudable piece of legislation, Van der Bank observes that an individual cannot bring an action against an invasion of privacy within the jurisdiction of England.⁶⁷⁴ There is no absolute right to privacy within English law,⁶⁷⁵ and thus, where an alleged 'breach of confidence' occurs, there is a dearth of defined remedies to facilitate the concept's worth. Tort law (the law of delict in South Africa) may achieve an appropriate measure of recourse where one's privacy is infringed within England,⁶⁷⁶ and the alleged invasion of privacy shall be determined by the long-reach of measures prescribed by the European Council.⁶⁷⁷

The case of *Laskey, Jaggard and Brown v United Kingdom* (herein referred to as *Laskey*),⁶⁷⁸ saw the appeal of the sentence passed by the House of Lords in *R v Brown* within the ECtHR.⁶⁷⁹ The appellants argued that the state had infringed their right to privacy, promised under Article 8 of the ECHR.⁶⁸⁰ To the appellants, the stance of the European authority favoured the protection of the private lives of citizens that belonged to 'Member-States' of the

⁶⁶⁶ Ibid at para 115.

⁶⁶⁷ Tanovich 'Criminalizing sex at the margins' (2010) 90.

⁶⁶⁸ *Human Rights Act 1998 Chapter 42*.

⁶⁶⁹ Convention for the Protection of Human Rights and Fundamental.

⁶⁷⁰ *Human Rights Act 1998 Chapter 42*.

⁶⁷¹ Article 8.

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Van der Bank 'The right to privacy - South African and comparative perspectives' (2012) 84.

⁶⁷⁵ See *Kaye v Robertson & Sport Newspapers Ltd* [1991] FSR 62.

⁶⁷⁶ Burchell 'The legal protection of privacy in South Africa: A transplant hybrid' (2009) 25.

⁶⁷⁷ Van der Bank op cit note 674 above at 84.

⁶⁷⁸ *Laskey, Jaggard and Brown V United Kingdom 1997* (Application No. 21627/93; 21628/93; 21974/93) Echr 4.

⁶⁷⁹ *R v Brown* [1994] 1 AC 212.

⁶⁸⁰ Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Convention.⁶⁸¹ The right to privacy was supported within the appeal, proving that the English Law's stance in prosecuting private and consensual sadomasochism may have infringed the privacy rights of the participants.⁶⁸²

The ECtHR consulted the judgement of the House of Lords in *R v Brown* and was alive to the fact that the current legal system of England permitted consensual adult interactions,⁶⁸³ which occurred in a private setting, so long as such interactions did not bring actual bodily harm.⁶⁸⁴ Therefore, the realisation that the legislature of England is imbued with a discretionary outlook in applying the criminal law, even in private adult interactions, is hinged upon the directives of public policy considerations.⁶⁸⁵ The ECtHR also noted that the prosecution of the appellants' actions, derived from the perspective of privacy, had inevitably caused a media frenzy. The publication of the private sadomasochistic activities had rippling effects across the lives of the appellants, bringing dismissals from their respective employers and even psychiatric treatment was needed for Mr Jaggard.⁶⁸⁶

The applicants alleged further that the 'unlawful and unjustifiable interference' of their private life by the criminal law of the country had also curtailed their right to sexual expression.⁶⁸⁷ However, the ECtHR ruled that no infringement of Article 8 had occurred, for the intrusion of the state within the private sexual relations of the consenting adults was justified by the harm that was caused between the participants. The State's involvement within the private lives of the sadomasochists fell within a compelling ground regarding the call for the greater public morals to triumph.⁶⁸⁸ Clearly, the ECtHR asserted that Article 8 is not an absolute right that entrenches privacy,⁶⁸⁹ nor does it create amnesty for all forms of private sexual expression.⁶⁹⁰ Therefore, the limitation of the right to privacy in the case of *Laskey* proves to be necessary within the 'confines of a democratic society' based on the actual bodily harm caused within the private sexual dichotomy.⁶⁹¹

⁶⁸¹ Ibid.

⁶⁸² *Laskey, Jaggard and Brown v United Kingdom* 1997 (Application No. 21627/93; 21628/93; 21974/93) ECHR 4 at para 22.

⁶⁸³ *R v Brown* [1994] 1 AC 212.

⁶⁸⁴ *Laskey, Jaggard and Brown v United Kingdom* supra at para 23.

⁶⁸⁵ Ibid.

⁶⁸⁶ Ibid at para 24.

⁶⁸⁷ Ibid at para 32.

⁶⁸⁸ Ibid at para 35.

⁶⁸⁹ Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶⁹⁰ *Laskey, Jaggard and Brown v United Kingdom* 1997 op cit at para 36.

⁶⁹¹ See Article 8.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The clear-cut stride of the ECtHR in *Laskey* is merely the penultimate dispute that is tied to the considerations of the respecting for one's private life within the jurisdiction of England. The case of *Mosely v News Group Newspapers* (herein referred to as *Mosley*) is a reflection of the strain upon the respect to privacy within England and a noteworthy submission to explore in determining the contemporary development of the right itself.⁶⁹² This submission contains elements of the sanctity for one's private interactions and the publicity of such within the media at large. The case was brought in the English High Court, where Max Mosley, the retired president of the automobile club *Fédération Internationale de l'Automobile*, complained about a newspaper article, written and published by the News Group Media, which outlined an activity of his private life.⁶⁹³ The headline of the 2008 issue was titled:

*'F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS.'*⁶⁹⁴

Mr Mosley complained that such was not an 'orgy', but rather, a party. He further complained that the News Group Newspapers had published personal pictures that depicted his participation in the private interaction. Additionally, Mr Mosley had sued for the publication of a video, which was secretly recorded, that depicted his participation within the interaction. This video was published in what was deemed a 'follow-up' article by the News Group Newspapers.⁶⁹⁵ The cause of action brought by Mr Mosley was a breach of confidence, stemming from the unauthorised disclosure of personal information.⁶⁹⁶ This was derived solely from a person's right to privacy, as afforded and promised under Article 8 of the ECHR.⁶⁹⁷

The basis of Mr Mosley's argument was not only supported by the claim that the published material was inherently sacred and private, but also that the participants to the sadomasochistic relationship were bound by a pre-existing agreement of confidentiality within their private interactions.⁶⁹⁸ The aforementioned submissions cater for the creation of what may be viewed as a 'reasonable expectation to privacy'. For purposes of this submission's fluidity, the investigation into the leakage of the alleged private material and allegation of a 'Nazi orgy' will not be explored. Rather, focus shall be drawn upon the issue of the extent of a reasonable expectation to privacy within English Law.

⁶⁹² *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB).

⁶⁹³ *Ibid* at para 1.

⁶⁹⁴ *Ibid*.

⁶⁹⁵ *Ibid* at para 2.

⁶⁹⁶ *Ibid* at para 3.

⁶⁹⁷ Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶⁹⁸ *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB) at para 4.

The existing law, at the time of *Mosley*,⁶⁹⁹ facilitated for the protection of personal information where such is entwined in a reasonable expectation of privacy.⁷⁰⁰ The High Court noted that such a measure is taken to safeguard the ‘autonomy, dignity and self-esteem’ of a person whose private information is compromised.⁷⁰¹ The ECHR expressly provides for the privacy,⁷⁰² and freedom of expression of a person, within the lawful confines of the designated State’s legislative framework.⁷⁰³ It appears, from the very wording of the Convention, that the extent of these rights are determined by what is ‘necessary within a democratic society.’⁷⁰⁴

By consideration of Mr Mosley’s complaint that the published material was private and confidential, the Court asserted that once confidential material enters the public domain, the confidentiality of its nature is lost.⁷⁰⁵ Furthermore, the court paid mention to the law’s ‘protection of confidence’ being a concept that must be upheld by the public interest in matters of privacy.⁷⁰⁶ However, the public interest, and its diversion in matters of privacy and confidential information is a sphinx of many heads. One facet of the public interest advocates for the protection of confidential and private material belonging to individuals, whereas a countervailing public interest may demand the disclosure of private material if such is necessary within a democratic society. Therefore, the public interest is simultaneously both herald and foe of the sanctity of private information, as such is dependent upon the nature of the information. Further, the position of the public interest proves to be directed by the nature of the disclosure regarding the private information. Here, the case of *Mosley* considered whether the private sadomasochistic encounter, disclosed by the News Group Newspapers to the public, fell sufficiently within the public’s interest to warrant such a disclosure as valid.⁷⁰⁷

The Court asserted that Article 8 of the ECHR accounted for privacy within sexual relationships, between consenting adults within their private confines.⁷⁰⁸ The Court also referred to the case of *Dudgeon v United Kingdom*,⁷⁰⁹ where it was held that there must be compelling reasons for the intrusion of a public body under Article 8.2,⁷¹⁰ for the private sexual

⁶⁹⁹ Ibid.

⁷⁰⁰ Ibid at para 7.

⁷⁰¹ Ibid.

⁷⁰² Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

⁷⁰³ Articles 8 and 10.

⁷⁰⁴ Ibid.

⁷⁰⁵ *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB) at para 13.

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid.

⁷⁰⁸ Ibid at para 98.

⁷⁰⁹ *Dudgeon v United Kingdom* (Application No. 7525/76) [1981] ECHR 5.

⁷¹⁰ Article 8.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

activity between consenting adults may be viewed as a crucial ingredient of one's personal life.⁷¹¹

Based on the affording of privacy's ambit to private sexual conduct, it was evident to the Court that it was not for the State, or any other entity, to publicise private conduct where no consequential contravention of the criminal law has occurred.⁷¹² Even though the sexual activity engaged by Mr Mosley involved sadomasochism, he was still entitled to a reasonable expectation of privacy under Article 8 of the ECHR.⁷¹³ The sadomasochistic interaction had occurred within the confines of a private property between consenting adults, involving activities of 'bondage, beating, and domination.'⁷¹⁴ The issue of whether these activities were worthy of the public interest was trampled underfoot by the Court's ruling. The wide-scale publication of Mr Mosley involvement in the sadomasochistic activities did not fall within the public interest, for no matter how morally divergent such activity may seem to some, the developing jurisprudential sphere of the English law provided minimal cause for a justifiable intrusion within this private sexual venture.⁷¹⁵ The court ruled that the News Group Newspapers had infringed Mr Mosley's right to privacy and damages were awarded in the Claimant's favour.⁷¹⁶

A commentary on the *Mosley* judgement is essential at this stage of development regarding the right to privacy in England. Mr Mosley's triumph may be viewed as a reverberating ripple upon the waters of England's privacy law jurisprudence, broadening the concept of the public interest to be viewed holistically and to afford the requisite protection for privacy where necessary and in line with existing legal rules and norms. The case of Mosley is far from a landmark decision within English law's barrage of skirmishes with consensual sadomasochism. It is, however, fluorescent in its virtue of the right to privacy, especially in sexual activities, and the deterioration of one's reputation where such privacy is infringed without just cause.

Mr Mosley had not yet finished his legal saga of dispute after the conclusion of his first case. He then approached the ECtHR in *Mosley v The United Kingdom*.⁷¹⁷ alleging that the country

⁷¹¹ *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB) at para 99.

⁷¹² *Ibid* at para 127.

⁷¹³ Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷¹⁴ *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB) at para 233.

⁷¹⁵ *Ibid*.

⁷¹⁶ *Ibid* at para 236.

⁷¹⁷ *Mosley v the United Kingdom* (Application No. 48009/08) [2011] ECHR 774.

had a positive obligation to safeguard his privacy, for the State had failed to create a legal duty upon the media publisher, News Group Newspapers, to notify him of their intended publication of his affairs.⁷¹⁸ Further, Mr Mosley complained that had such a duty existed upon News Group Newspapers, he would have been notified before the publication was made, affording him sufficient time to acquire an interim injunction to prevent such private material from eluding him.⁷¹⁹

Between the scorn and damage to his personal reputation by the original publication of his private sadomasochistic acts, it is viewed that Mr Mosley's appeal to the ECtHR was to effect a necessary and pertinent change within England's privacy laws.⁷²⁰ Clearly, Mr Mosley's argument for the creation of a legal obligation by the incorporation of a pre-notification system imposed upon individuals intending the publication of another's private material, would greatly enshrine the respect for privacy in England.

The Court was aware that the focal point of privacy was derived significantly from Article 8 of the ECHR;⁷²¹ however, the Court was tasked to analyse whether such an obligation of a legal duty of pre-notification could be derived from this Article. The Court took heed of the nature of the facts, which exposed an intimate and private 'variant sexual activity', being that of sadomasochism.⁷²² However, the submission of the respondent argued that if a pre-notification obligation would be adopted, the volume of interim injunctions would manifest in great quantity, severely impairing the freedom of expression of the media and other news outlets.⁷²³ Therefore, the emerging consideration of *Mosley v The United Kingdom* is the balancing act afforded between the right to freedom of expression,⁷²⁴ and its relationship to the respecting of privacy.⁷²⁵

To the Court, Article 8 propelled the respecting of one's private and family life, but also compelled the State to take positive steps in allowing a person to enjoy the full extent of their privacy.⁷²⁶ However, it was emphasised that a clear balance must be struck between the right to privacy and freedom of expression, evolving from the consideration that an equilibrium of respect for these rights may be achieved by the consideration of the State's interests and the

⁷¹⁸ Ibid at para 65.

⁷¹⁹ Ibid.

⁷²⁰ Ibid at para 71.

⁷²¹ Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷²² *Mosley v the United Kingdom* (Application No. 48009/08) [2011] ECHR 774 at para 71.

⁷²³ Ibid at para 86.

⁷²⁴ Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷²⁵ Ibid.

⁷²⁶ *Mosley v United Kingdom* (Application No. 48009/08) [2011] ECHR 774 at para 106.

interests of the public. The media wing of the State must be given an aura of positive recognition and support with regard to the publishing of material that relates to the facilitation of the public interest.⁷²⁷ Such a role is not that of a ‘guard-dog’ of public virtue and mirth, but rather, a harbinger of contemporary issues that relate to the lawful transmission of the public interest within a defined boundary in which the media and press may operate.⁷²⁸ As noted by the Court, the media and press of the country are regulated by its own internal rules and procedures,⁷²⁹ adherent to freedom of expression and in line with the respecting of a person’s private life.

The Court ruled that Article 8 did not compel the England to implement a pre-notification obligation in its duty to uphold and respect the privacy of its citizens. Even though the Article promotes for the effective safeguarding of privacy, such does not dictate that a pre-notification obligation is essential for the realisation of personal privacy in one’s private life. The freedom of expression consideration, attempting to effect a fair balance of rights, proves that expression is not only confined to the media-wing of the State but also unravelling into the sphere of ‘political reporting and serious investigative journalism.’⁷³⁰

From this, it can be ascertained that the satisfaction of the obligation upon the Respondent, in its bolstering of the respect of private life,⁷³¹ was the awarding of damages as a suitable remedy for Mr Mosley in his first case in the English High Court.⁷³² Thus, the Court unanimously ruled that the absence of a pre-notification obligation does not violate the respecting of a person’s private life by the Respondent and such could not be imposed by the State to effect its duty under Article 8 of the ECHR. To the Court, apart from the possible emergence of a chilling effect, a pre-notification obligation would inevitably treat all future publications by a media outlet as a reflection of Mr Mosley’s scandal.⁷³³ Therefore, where the obligation to respect the right to one’s privacy fails within the jurisdiction of England, a suitable remedy may be derived from the law of tort (delict) in the form of damages.

Even though the right to privacy is implanted within the South African Constitution,⁷³⁴ the ‘public benefit’, or public interest, is a prominent limiting factor of the right to privacy in

⁷²⁷ Ibid at para 111.

⁷²⁸ Ibid at para 112.

⁷²⁹ Ibid at para 119.

⁷³⁰ Ibid at para 121.

⁷³¹ Ibid at para 120.

⁷³² *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB).

⁷³³ *Mosley v United Kingdom* (Application No. 48009/08) [2011] ECHR 774 at para 132.

⁷³⁴ Section 14 of The Constitution of the Republic of South Africa.

certain matters.⁷³⁵ As a preliminary remark, the Constitutional Court in *Bernstein v Bester NO* stated:

*'Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.'*⁷³⁶

Such a broad definition of privacy, and its permissibility for autonomous behaviour by individuals, provides for a superficial guiding network for the true extent of the right within the South African legal framework. However, as noted by the Constitutional Court, the certainty of the right to privacy, and its limitations within the South African legal system are perplexed in the understanding that:

*'Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'*⁷³⁷

Public benefit or 'public interest', as it was referred to in the case of *Mosley v News Group Newspapers*,⁷³⁸ allots itself within the conceptualisation of the right to privacy. These considerations dictate that a viable and pressing social concern will warrant the exposure of what is considered 'private information'. Madala J, in the South African case of *NM v Smith*,⁷³⁹ importantly noted that:

*'This protection of privacy in my view raises in every individual an expectation that he or she will not be interfered with. Indeed there must be a pressing social need for that expectation to be violated and the person's rights to privacy interfered with.'*⁷⁴⁰

The public benefit, if arising as a pressing social need for the limitation of the right to privacy, may rightly call for justifiable intrusions within the public sector.⁷⁴¹ Journalists and other media outlets within South Africa are empowered to cover aspects of an individual's social life, provided such coverage does not cause the serious impairment of one's personality rights.⁷⁴² However, an invasion within the private sanctum of an individual's life, revealing intimate information, shall require a pressing reason or concern to warrant social exposure. Therefore,

⁷³⁵ Burchell 'The legal protection of privacy in South Africa: A transplate hybrid' (2009) 19.

⁷³⁶ *Bernstein v Bester NO* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (CC) (27 March 1996) at para 68.

⁷³⁷ *Ibid* at para 67.

⁷³⁸ *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB).

⁷³⁹ *NM v Smith* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (4 April 2007).

⁷⁴⁰ At para. 45.

⁷⁴¹ *Ibid*.

⁷⁴² W. Steiner "Justifying Limitations on Privacy: The Influence of the Proportionality Test in South African and German Law" (Masters thesis, University of Cape Town, 2013), 41.

the private sphere of individual interactions is fortified in a far more mammoth-like defence regarding the right to privacy. As explored by Steiner,⁷⁴³ in the reflection of the ‘Limitations Clause’ of section 36 of the Constitution,⁷⁴⁴ a proportionality test regarding the limitation of the right to privacy in each individual case is paramount for the interpretation of the right when juxtaposed to other substantial interests of the State.⁷⁴⁵ The test, as accounted for by Steiner, is to determine whether a justifiable limitation of the personality right to privacy is sufficient.⁷⁴⁶

The case of *Mistry v Interim National Medical and Dental Council* conjures a defined checklist to determine when an intervening party has justifiably limited the right to privacy in South African law.⁷⁴⁷ This submission supports Steiner’s proportionality test, demanding a heightened level of justification on part of the intervening party where, *inter alia*, any of the following elements arise:⁷⁴⁸

- a) Where private information has been obtained by an intrusion or in an invasive manner.⁷⁴⁹
- b) Where private information correlates to intimate aspects of the person’s life.⁷⁵⁰
- c) Where personal data is provided by a person, yet is used for an outcome that is ancillary to the envisioned transmission of the personal data.⁷⁵¹

It is apparent that an intrusion into one’s private life may bring more than just the limitation of the right to privacy, but also involves the sweeping of other fundamental personality rights into dispute. The Constitutional tunic of privacy within South Africa, if not absolute, still provides for a stringent approach where an intervening party breaches the confines of one’s private life. Ultimately, the remedies afforded by the English courts,⁷⁵² where an unjustified invasion of one’s private life occurs, serves as the forerunner in an effective safeguard for personality rights,⁷⁵³ such as privacy. As considered by Burchell,⁷⁵⁴ the law of delict, and its remedy of awarding damages to an injured party would stand as an enduring beacon of the pragmatic approach in the protection of personality rights. This will test the Constitutionality of the right

⁷⁴³ Ibid at 23, 24.

⁷⁴⁴ Section 36 of The Constitution of the Republic of South Africa.

⁷⁴⁵ Steiner op cit note 742 above at 24.

⁷⁴⁶ Ibid 29.

⁷⁴⁷ *Mistry v Interim National Medical and Dental Council* (CCT13/97) [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) (29 May 1998).

⁷⁴⁸ Steiner op cit note 742 above at 48.

⁷⁴⁹ *Mistry v Interim National Medical and Dental Council* supra at para. 51.

⁷⁵⁰ Ibid.

⁷⁵¹ Ibid.

⁷⁵² See *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB).

⁷⁵³ Burchell ‘The legal protection of privacy in South Africa: A transplate hybrid’ (2009) 24.

⁷⁵⁴ Ibid at 25.

to privacy based on the facts of each matter and seeks to find an equitable balance when weighed against the right to freedom of expression and the public interest.⁷⁵⁵

4.5 The Right to Human Dignity

As a prelude to the exploration of the legal concept of human dignity, its ancient roots, which have existed amongst multiple civilisations since classical antiquity, are an amicable starting point for the reflection of this enduring concept. Take, for instance, Alexander III of Macedon,⁷⁵⁶ who, after defeating Darius III of Persia,⁷⁵⁷ set his gaze upon the Hindu-Kush in the hopes of traversing what was then considered the ‘known world’. The conflict with the ancient Indian kingdom of Pauravas is a mere notch upon the decorated pommel of Alexander’s military exploits,⁷⁵⁸ yet the methodology of human dignity was tested here when Alexander defeated King Porus of Pauravas at the Battle of the Hydaspes.⁷⁵⁹ When a captured King Porus was brought before Alexander, he was asked how he would like to be treated, for a prisoner is no different to a slave. Porus replied:

‘[As] a king would treat another king.’

The request of Porus greatly influenced Alexander and reminded him of his prisoner’s position before the battle. By understanding Porus’s inherent dignity, Alexander freed the captured king and elevated him to serve as a vassal-king, or ‘aide-de-camp’, in the Ancient Macedonian Army. The recount of Alexander and Porus proposes an antediluvian conceptualisation of both ‘*Dignitas*’ and what would later be called ‘human dignity’. These two paramount considerations give flight to the focus of this subchapter and the ongoing evolution of the concept of human dignity. As an introduction for both jurisprudential abstractions, Steinmann describes the historical stance on *Dignitas* as:⁷⁶⁰

‘[A]n acquired personal status in a specific social framework.’⁷⁶¹

⁷⁵⁵ Ibid.

⁷⁵⁶ ‘Alexander the Great’ (356 – 323 BC).

⁷⁵⁷ Darius III of Persia (380 – 330 BC).

⁷⁵⁸ Alexander had been a prolific military strategist, winning vast conquests of the ancient world and his reputation preceding as far as to the Oracle of Siwa, who declared him as the ‘true son of Zeus’.

⁷⁵⁹ A.P. Boardman "An Analysis of the Generalship of Alexander Iii of Macedon: Undermining or Underlining Greatness?" (Doctoral thesis, Durham University, 1999) 37 (accessed on 14 August 2018).

⁷⁶⁰ A.C. Steinmann "The Legal Significance of Human Dignity " (Doctoral thesis, North-West University, 2016).

⁷⁶¹ Ibid 29.

Therefore, *Dignitas*, and its etymology from both Latin and Greek alludes to the qualities of honour, moral dignity, embellishment, personal-esteem, and respect.⁷⁶² This can be extenuated to a preceding reputation of respect that is associated with an individual who occupies a specific position with a social setting. Steinmann goes on to recognise that the concept of *Dignitas* in Roman times existed within the following segments:⁷⁶³

- a) A hierarchical consideration of significant social standing in the variant upper classes of civil life within the Republic of Rome.⁷⁶⁴
- b) A concept, or standard, of honourability and integrity to effect ‘the unlocking of the full possibilities of life’.⁷⁶⁵
- c) Existent within those that occupied the echelons of high public office, inhabiting such positions based on their acts of virtue, integrity, military prowess, or sacrifice to Roman society.⁷⁶⁶
- d) A factor of assessment that existed within the law of the Republic of Rome as being the yardstick test where compensation is required.⁷⁶⁷
- e) Belonging to the Roman government, or the ‘entity that was Rome’, as a paragon virtue.⁷⁶⁸

From this submission, it can be viewed that *Dignitas* was the manifestation of a person’s social standing within society, facilitated with the qualities of honour, virtue, integrity and respect. It served as an intangible and embellished social portrait of an individual who was deemed worthy of such status. The subjectivity of Roman citizens, and those that came before them, in awarding *Dignitas* based on the chivalrous actions of a few, would change substantially in the decades to come. The concept of *Dignitas* echoes a disjunctive regime of equality within Roman society and the private sphere of that ancient dynamic. The infringement of one’s *Dignitas*, as noted by Steinmann from this common law regime, would give rise to an *iniuria*.⁷⁶⁹ This may be defined as an insulting display of behaviour or conduct, allowing for delictual liability against the wrongdoer.⁷⁷⁰

⁷⁶² Ibid 34.

⁷⁶³ Ibid 35.

⁷⁶⁴ Donnelly as cited in Steinmann.

⁷⁶⁵ Ibid.

⁷⁶⁶ Ibid.

⁷⁶⁷ Ibid.

⁷⁶⁸ Ibid 44.

⁷⁶⁹ This form of liability is still existent within the South African law of delict, inspired by the hybrid legal system’s Roman-Dutch roots.

⁷⁷⁰ Steinmann "The Legal Significance of Human Dignity" (2016) 45.

These tiny embers of early jurisprudential notions regarding the concept of ‘dignity’ led to the eventual progression of what was later acknowledged as *Dignitas hominis* by the Stoic philosophers of Greece.⁷⁷¹ *Dignitas hominis* is the consideration of an imbued universal elevation of dignity for each person of the world by virtue of their inherent humanity; allowing for the key factor of reasoning to serve as the benchmark test of dignity.⁷⁷² These steps of jurisprudential intrigue are honed by the objective understanding that the human race collectively has inherent dignity.⁷⁷³ This is indicative to the notion of that which separates us from all other inhabitants within the natural world; that being the cognitive ability to exercise reason. Jordaan notes that the quality of reasoning is of ‘immeasurable value’,⁷⁷⁴ which facilitates and allows for self-growth of every human. This submission also supports the validity of personal autonomy by one’s exhibition of reason, which is viewed as an accessory to the concept of *Dignitas hominis*.

The rise of the concept of human dignity is an extension of the *Dignitas hominis*, embedding the moral notion of ‘absolute inner worth’,⁷⁷⁵ demanded by each person within the elevation of his or her personal interactions and derived from their inherent humanity.⁷⁷⁶ Human dignity is further supported by the philosophical claim of distinguishable humanity,⁷⁷⁷ which is viewed as intrinsic to each human upon birth,⁷⁷⁸ originating from the virtue of a person’s capability of reasoning and free, autonomous, will.⁷⁷⁹ This rests upon a potential jurisprudential quagmire of thought; attempting to ascertain whether human dignity is existent only as a right, or if it stands within the duality of a value that demands respect and obligatory conformity in its protection from others.⁷⁸⁰

To shed light upon the conceptualisation of dignity, the UDHR is an early quintessential canvas of human rights,⁷⁸¹ entrenching inherent human dignity within its preamble by recognising that:

⁷⁷¹ Zeno of Citium (334 – 262 BC) was the founder of the Stoic school of philosophy, giving rise to stoicism.

⁷⁷² A.C. Steinmann ‘The core meaning of human dignity’ (2016) 19 *PER/PELJ* 5.

⁷⁷³ Steinmann “The Legal Significance of Human Dignity” (2016) 37.

⁷⁷⁴ Jordaan ‘Autonomy as an element of human dignity in South African case law’ (2009) 2.

⁷⁷⁵ Rostbøll ‘Political theory - autonomy, respect, and arrogance in the Danish cartoon controversy’ (2009) 632.

⁷⁷⁶ Ibid.

⁷⁷⁷ Immanuel Kant (1724 – 1804), and his philosophical influence during the Age of Enlightenment, proposed that human dignity is deciphered by the understanding and recognition of man’s personal autonomy. To Kant, autonomy existed at a central node of human dignity, and the recognition of such autonomy added to morality and self-determination of all rational people. Kant further recognised that human nature gives flight to human dignity, based on the intrinsic worth of the ‘moral’ concept.

⁷⁷⁸ Jordaan ‘Autonomy as an element of human dignity in South African case law’ (2009) 3.

⁷⁷⁹ Steinmann “The Legal Significance of Human Dignity” (2016) 29.

⁷⁸⁰ N.M. Goolam ‘Human dignity - our supreme constitutional value’ (2001) 4 *PER/PELJ* 46.

⁷⁸¹ UN General Assembly “Universal Declaration of Human Rights” (1948).

*'[The] inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'*⁷⁸²

Such is a testament to the prevalence of the inherent nature of human dignity from an international standpoint, for the UDHR is a codex of the essential human rights of the modern world.⁷⁸³ Furthermore, this expresses that human dignity is the bedrock of many other rights, inclusive of the right to freedom. Article 1 itself endorses the dignity rights belonging to each human upon their birth.⁷⁸⁴ This reflects the inherent, or intrinsic, nature of the right to human dignity and its resonance within a universal jurisprudential value system. Thus, dignity's inherent nature serves as an aid to the formation of one's personality by giving flight to other personality rights.⁷⁸⁵ Further, Article 23 proposes the socio-economic rights of every person and notably accounts for the 'favourable remuneration' of an employee.⁷⁸⁶ This is done to bolster the deliberation of what may be considered 'favourable remuneration', sufficient for a person to lead a family life 'worthy of human dignity.'⁷⁸⁷ This nuanced submission, encapsulated by the broad parameters of what is perceived as 'human dignity' within the Declaration,⁷⁸⁸ projects that dignity is holistic and spread into multiple facets of human life. Dignity to the Declaration is thus not singly a right but also exists as a broad value, which is carved within a reciprocal obligation of promoting such interests.

Human dignity is expressly provided for within the Bill of Rights, found in Chapter 2 of the Constitution of the Republic of South Africa.⁷⁸⁹ This proved to be a momentous leap for the jurisprudence of South Africa, as the past Apartheid regime had denied the commonality of human dignity between different race groups.⁷⁹⁰ Under section 10, the right to dignity reads as follows:

*'Everyone has inherent dignity and the right to have their dignity respected and protected.'*⁷⁹¹

This is a manifestation of the State's recognition of an individual's inherent worth, unanimously applied to all persons in support of their individualism. The South African

⁷⁸² See preamble.

⁷⁸³ Ibid.

⁷⁸⁴ Article 1.

⁷⁸⁵ P. Kain 'Kant's defense of human moral status' (2009) 47 *Journal of the History of Philosophy* 88.

⁷⁸⁶ Article 23 of the Universal Declaration of Human Rights.

⁷⁸⁷ Article 23.3.

⁷⁸⁸ UN General Assembly "Universal Declaration of Human Rights" 217.

⁷⁸⁹ The Constitution of the Republic of South Africa.

⁷⁹⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 329.

⁷⁹¹ Section 10 of the Constitution of the Republic of South Africa.

perspective on the legality of human dignity is converse to the ancient hierarchical concept of *Dignitas*.⁷⁹² Jordaan,⁷⁹³ Goolam,⁷⁹⁴ and Steinmann have respectively identified that human dignity exists as both a value and right within the South African legal framework.⁷⁹⁵ Even with an express Constitutional provision, dignity has had trouble finding a clear and defined footing within the South African legal system. Ackermann J, in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, supports this by stating that:

*'Dignity is a difficult concept to capture in precise terms.'*⁷⁹⁶

This is attributed to the chameleon-like duality in which human dignity finds itself in, one moment interpreted as an enforceable right,⁷⁹⁷ the other, as a collective set of values. The latter allows human dignity to serve as the cornerstone in the linking of other personality rights,⁷⁹⁸ based on its inherent nature.⁷⁹⁹ From the perspective of human dignity standing as a value within the South African legal system, its endurance as a moral custodian for the interpretation of other human rights, by virtue of section 39(1) of the Constitution,⁸⁰⁰ is noteworthy. The 'Interpretation Clause' allows for the value of human dignity to stand as a benchmark in the assessment of a court,⁸⁰¹ or tribunal when interpreting the contents of the Bill of Rights to promote the values of an open and democratic society that respects and endorses human dignity. Secondly, a normative reflection of the value of human dignity exists as a pivotal legal-analyser when applying section 36(1) of the Constitution.⁸⁰² Thus, the value of human dignity serves as an overarching archetype of the investigation in the determination of whether a fundamental right may be limited.⁸⁰³

Section 10 of the Constitution creates a tacit bulwark against its own infringement by ushering through the prerogative of the respect and protection for a person's right to human dignity, owed by the State and others within the Republic of South Africa.⁸⁰⁴ Therefore, a remedy is

⁷⁹² Steinmann 'The core meaning of human dignity' (2016) 11.

⁷⁹³ See Jordaan 'Autonomy as an element of human dignity in South African case law' (2009).

⁷⁹⁴ See Goolam 'Human dignity - our supreme constitutional value' (2001).

⁷⁹⁵ See Steinmann "The Legal Significance of Human Dignity" (2016).

⁷⁹⁶ In *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (9 October 1998) at para 28.

⁷⁹⁷ Jordaan 'Autonomy as an element of human dignity in South African case law' (2009) 3.

⁷⁹⁸ *Khumalo v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (14 June 2002) at para 27.

⁷⁹⁹ Section 10 of The Constitution of the Republic of South Africa.

⁸⁰⁰ Section 39(1).

⁸⁰¹ Section 39(1)(a).

⁸⁰² Section 36(1).

⁸⁰³ Steinmann "The Legal Significance of Human Dignity" (2016) 362.

⁸⁰⁴ Section 10 of The Constitution of the Republic of South Africa.

available to one whose right to human dignity has been infringed, being that of *crimen iniuria*.⁸⁰⁵ Burchell analyses that the crime of *crimen iniuria* arises where one unlawfully and intentionally impairs the dignity, or privacy,⁸⁰⁶ of another person.⁸⁰⁷ This will allow the relevant court of inquiry to objectively determine whether one's dignity or privacy, has been unlawfully infringed⁸⁰⁸. In doing so, the relevant court must also take into account the aggrieved party's individual human dignity, which will stem from a subjective analysis of personal 'self-worth' of the person.⁸⁰⁹ Therefore, as autonomy is an accessory element to human dignity,⁸¹⁰ the subjective, autonomous display of such a person's human dignity must be explored when considering the crime of *crimen iniuria*.⁸¹¹ The victim to a crime of *crimen iniuria* must subjectively feel that their dignity, or privacy, has been unlawfully violated by the conduct of the accused.⁸¹² On the other end of the spectrum, the objective test of the court must assess whether a reasonable person in the victim's position would feel equally offended by the conduct of the accused.

The principles from the case of *S v Makwanyane* promote the commonality of human dignity as a fundamental Constitutional right and value, forming the backbone to personality rights within a free and democratic society.⁸¹³ This, in turn, spurs the realisation of the right to human dignity as a juncture of intrinsic human worth. The right to human dignity coincides with other rights including, *inter alia*, privacy,⁸¹⁴ equality,⁸¹⁵ and freedom.⁸¹⁶ As stated by O'Regan J in *S v Makwanyane*:

*'Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in... [the Bill of Rights].'*⁸¹⁷

⁸⁰⁵ Moon and Allen as cited in Steinmann "The Legal Significance of Human Dignity" (2016) 159, 160.

⁸⁰⁶ This, once again, shows human dignity's close correlation with other rights, namely privacy, and the stance taken within the South African common law to punish one who has violated another's right to dignity or privacy.

⁸⁰⁷ Burchell *Principles of Criminal Law* (2013) 632.

⁸⁰⁸ Ibid 634.

⁸⁰⁹ Ibid.

⁸¹⁰ Jordaan 'Autonomy as an element of human dignity in South African case law' (2009) 10.

⁸¹¹ *Crimen iniuria* is inherited within the South African legal system by the country's common law roots to Roman Law.

⁸¹² *Aphane v S* (A621/2007) [2009] ZAGPPHC 264 (10 September 2009) at para 9.

⁸¹³ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁸¹⁴ *Khumalo v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (14 June 2002) at para 27.

⁸¹⁵ See preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁸¹⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 155.

⁸¹⁷ At para 328.

It is also appropriate to note that the concept of human dignity within South African jurisprudence is not only hinged upon the determination of individualistic human worth. As accounted for by Yacoob J in the case of *Government of the Republic of South Africa v Grootboom* noted:

*'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied [to] those who have no food, clothing or shelter.'*⁸¹⁸

This submission gives credence to the fact that the South African outlook on human dignity is not only confined to a psychological avenue but also trickles within the realm of the protection of physical dignity.⁸¹⁹ These are beaming reflections of the socio-economic rights, as provided for by the UDHR in the recognition of the completeness of human dignity.⁸²⁰

Therefore, human dignity in South African law strides as a holistic conceptualisation of the inherent worth of every person within their unique paths and singularities.⁸²¹ Further, the right to human dignity bolsters the maintenance of essential, physical measures that add to a person's dignified way of living. The right to human dignity and its constructs are far-reaching, outlining its protection and safety with an emphasis upon the intrinsic endorsement of the right for each individual.

4.6 The Right to Freedom of Expression

Amongst the array of content found within the Bill of Rights, the right to freedom of expression is also promised within the contemporary South African society.⁸²² In a reflection of South Africa's censored past,⁸²³ it was necessary for the new Constitutional democracy to facilitate for the autonomous expression of citizens, inevitably linking to other specific rights afforded for under the Bill of Rights. O'Regan J, in the case of *South African National Defence Union*

⁸¹⁸ *Government of the Republic of South Africa v Grootboom* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (4 October 2000) at para 23.

⁸¹⁹ E. Grant 'Dignity and equality' (2007) 7 *Human Rights Law Review* 312.

⁸²⁰ See UN General Assembly "Universal Declaration of Human Rights".

⁸²¹ Bennett 'Ubuntu: An African equity' (2011) 48.

⁸²² The Constitution of the Republic of South Africa.

⁸²³ *Shabalala v Attorney-General of the Transvaal* (CCT23/94) [1995] ZACC 12; 1995 (12) BCLR 1593 (CC); 1996 (1) SA 725 (CC) at para 26.

v Minister of Defence,⁸²⁴ supports the new-age Constitutional value of the right to freedom of expression by evaluating that:

*'[Freedom of expression] is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial..'*⁸²⁵

Consequently, this statement from O'Regan J is a fundamental deciphering instrument in the determination of the merit of the right to freedom of expression.⁸²⁶ Freedom of expression co-exists with the interlocking of other constitutionally protected rights that are propelled upon the spire of one's personal autonomy. This value system of imperial constitutionalism promotes that freedom of expression works to instil the foundations of the new democratic society by allowing one's expression to serve as a defining facet of their personality. This enhances collectivism between those persons with similar interests and beliefs and adds flourishes of diversity within the democratic society, based on the autonomous dispensation of one's freedom of expression.

A momentary detour regarding the exploration of the South African law's stance is necessary to expose the International perspectives regarding the right to freedom of expression. Under the UDHR, Article 19 asserts that all persons are entitled to freedom of opinion and expression without prejudice, or interference, from others.⁸²⁷ The Declaration's textual definition of the right to freedom of expression works as a forebear for the ECHR,⁸²⁸ reflecting its prominence within the legal spheres of its member-nations in Europe.⁸²⁹ Article 10(1) promises the right to freedom of opinion and expression to the exclusion of inferences by another.⁸³⁰ This provision is clearly inspired by the esteem of the UDHR, yet the ECHR also codifies a limitation to the right, which was not accounted for by the Declaration.

⁸²⁴ *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615.

⁸²⁵ At para 8.

⁸²⁶ Ibid.

⁸²⁷ Article 19 of the Universal Declaration of Human Rights.

⁸²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms.

⁸²⁹ Ibid.

⁸³⁰ Article 10(1).

Under Article 10(2), it is expressed that the freedom of one's expression is not an absolute right, as the right itself creates reciprocal duties upon the holder when exercising such a right.⁸³¹ Limitations upon the right to freedom of expression shall occur if prescribed by the law and necessary within a democratic society. This consideration of an internal limitation exists as a dichotomy within the right to freedom of expression itself, further supported in the interests of; *inter alia*, the protection of health and public morals, the protection of private information, the protection of the reputation of a person and the prevention of crimes.⁸³²

The resonance of the ECHR amongst its member states within Europe displays a proud panoply of enacted legislation to support the Convention's ethos. England is a signatory to the Convention and demonstrated its compliance by the enactment of the Human Rights Act.⁸³³ Before the Human Rights Act, there was a dearth of statutory support for freedom of expression within the country.⁸³⁴ Such protection over the right was initially derived from the country's common law regime, allowing for the liberal interpretation of the freedom of one's opinion and expression at this node in judicial history.⁸³⁵ The dawn of the English statutory regime, which accommodated for the right to freedom of expression, codified the right under section 12 of the Human Rights Act.⁸³⁶

The Human Rights Act does not impose any limitations upon the right to freedom of expression, it merely provides for a remedy where the right is infringed. The absence of any limitations clause to the right to freedom of expression may be attributed to the impact of Article 10(2) of the Convention,⁸³⁷ clearly defining the possible limitations of the right where necessary. England allows for a flurry of freedoms that constitute an expression; be it in the form of political speech, educational and intellectual expression, and artistic or literary expression.⁸³⁸ Media outlets, publishers, and newspaper groups also enjoy the right to freedom of expression within England, albeit along a tightrope that is balanced against the right to individual privacy.⁸³⁹ Interestingly, the judiciary of England, in the case of *O'Shea v MGN*

⁸³¹ Article 10(2).

⁸³² Ibid.

⁸³³ Human Rights Act 1998, chapter 42.

⁸³⁴ H. Worthington "An Analysis of the Conflict between Freedom of Expression and Trademark Protection" (Masters thesis, University of Pretoria, 2013), 9.

⁸³⁵ Ibid at 10.

⁸³⁶ Section 12 of the Human Rights Act 1998 Chapter 42.

⁸³⁷ Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁸³⁸ Worthington 'An analysis of the conflict between freedom of expression and trademark protection' (2013) 10.

⁸³⁹ See *Mosley v the United Kingdom* (Application No. 48009/08) [2011] ECHR 774.

Ltd,⁸⁴⁰ held that the publication of a pornographic advertisement in dispute, no matter how morally divergent such may be to some groups within the public, constituted a valid exercise of a publisher's freedom of expression within the contemporary legal framework.⁸⁴¹

Canadian law accommodates for the right to freedom of expression within its Constitution Act,⁸⁴² outlining the right within the Canadian Charter of Rights and Freedoms. Freedom of expression exists as a fundamental freedom, in tow with its analogous counterparts such as freedom of thought, opinion, and belief.⁸⁴³ Therefore, freedom of speech is not the only measure of freedom afforded by the Canadian legislature, for freedom of expression is a broad and diverse concept that is greatly emphasised. An expression may exist within a multitude of possibilities, stemming from an activity, gesture, song, dance or any other display that exhibits a meaningful expression by the maker.⁸⁴⁴ The Canadian case of *R v Ghomeshi* unravelled in wide media coverage, involving the famous CBC Network host, Jian Ghomeshi, who was accused of assaulting three women in non-consensual sadomasochism on three separate occasions.⁸⁴⁵ Mr Ghomeshi had argued that the activities were consensual and raised the defence of 'kink',⁸⁴⁶ stating that it was his freedom of expression to engage in sadomasochism. Interestingly, Mr Ghomeshi was acquitted of all charges of assault, as the defence was successful in discrediting the credibility of the complainants' sworn statements.⁸⁴⁷ The importance of Mr Ghomeshi's trial exposes that freedom of sexual expression may arise in unpalatable forms to some, but may yet still endure as a valid form of expression nonetheless.⁸⁴⁸

The South African law's stance on the right to freedom of expression displays similarity to the legal perspectives of English and Canadian law. Apart from a person's verbal expressions, non-verbal expressions, such as gestures, carry just as much significance within the legal dynamic of South Africa. So too is freedom of artistic creativity,⁸⁴⁹ enduring as a protected form of expression and serving as a broad and expansive autonomous concept. This form of expression

⁸⁴⁰ *O'Shea v MGN Ltd* (2001) All ER (D) 65.

⁸⁴¹ *Ibid* at para 37.

⁸⁴² Constitution Act, 1982.

⁸⁴³ Section 2(b) of the *Canadian Charter of Rights and Freedoms*.

⁸⁴⁴ *Weisfeld v Canada* [1995] 1 FC 68 (FCA).

⁸⁴⁵ *R v Ghomeshi* 2016 ONCJ 155.

⁸⁴⁶ E. Grinberg "The Issue with Ousted CBC Host Jian Ghomeshi's 'Kinky Defense'," *CNN* (2 November 2014), Retrieved from <https://edition.cnn.com/2014/10/28/living/jian-ghomeshi-cbc-fired-BDSM/index.html>. (accessed on August 25, 2018).

⁸⁴⁷ *R v Ghomeshi* 2016 ONCJ 155 at para 137.

⁸⁴⁸ K. Stoeffel "Jian Ghomeshi Isn't the First Alleged Abuser to Cite the Right to BDSM Sexuality" *The Cut*, (28 October 2014), Retrieved from <https://www.thecut.com/2014/10/jian-ghomeshi-and-the-right-to-BDSM-sexuality.html>. (accessed on 25 August 2018).

⁸⁴⁹ Section 16(1)(c) of The Constitution of the Republic of South Africa.

includes for the creation of, *inter alia*, films, music, dance, and paintings within the open and democratic society of South Africa.⁸⁵⁰ However, the vastness associated with the freedom of expression within South Africa is not an absolute right. Under section 16(2) of the Constitution, the right to freedom of expression may be limited within the occurrence of the following:

‘(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.’⁸⁵¹

The importance of section 16(2) is that it imposes a duality within the right to freedom of expression. The internal limitation mechanism, reflective of the ECHR’s prerogatives of the extent to one’s freedom of expression within a democratic society,⁸⁵² serves as a candid muse for the new-age Constitutional order of South Africa. Freedom of expression may be enshrined as a fundamental freedom, yet the intention of the South African legislature clearly seeks to keep in check the extent of a person’s freedom of expression to prevent harm from befalling others within the democratic society.⁸⁵³ A definitive bar on avenues of freedom of expression appears to be necessary within an ‘open and democratic society’,⁸⁵⁴ for the prevention of physical and psychological harm exists as a definitive value for the State to uphold. Furthermore, the internal limitation of the right to freedom of expression is implanted to preserve the rights to equality,⁸⁵⁵ and dignity, within South Africa,⁸⁵⁶ propelling the intertwined nature of freedom of expression to other constitutionally guaranteed rights.⁸⁵⁷ In the case of *Laugh It Off Promotions CC v South African Breweries International*, it was understood that section 16(2) is only as expansive as its defined limitations:

*‘It follows clearly that unless an expressive act is excluded by section 16(2) it is protected expression.’*⁸⁵⁸

⁸⁵⁰ I.J. Oosthuizen ‘A constitutionalised perspective on freedom of artistic expression’ (2001) 21 *South African Journal of Education* 620.

⁸⁵¹ Section 16(2)(a)-(c) of The Constitution of the Republic of South Africa.

⁸⁵² Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁸⁵³ Section 16(1) of The Constitution of the Republic of South Africa.

⁸⁵⁴ Section 39(1)(a).

⁸⁵⁵ Section 9.

⁸⁵⁶ Section 10.

⁸⁵⁷ *Laugh It Off Promotions CC v South African Breweries International (Finance) Bv T/a Sabmark International* (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at para 45.

⁸⁵⁸ *Ibid.* at para. 47.

Therefore, if a form of expression does not fall within the allocated limitations of section 16(2), such may be deemed as a protected form of expression. However, where a form of freedom of expression eludes the categories outlined within section 16(2), the 'Limitations Clause' of section 36(1) of the Constitution would rise to combat this.⁸⁵⁹ The approach of the broad-sweeping 'Limitations Clause' would harness the implementation of the law of general application to limit the right to freedom of expression if such is necessary and justifiable in an open and democratic society.⁸⁶⁰ However, freedom of expression is a right that is entwined with others in the Bill of Rights. A limitation on expression may likely cause a 'domino-effect' and limit the extent of a complimentary right. If a court were to apply section 36(1) to freedom of expression, such must be done with the justified appreciation that other rights may be curtailed.⁸⁶¹ Furthermore, where freedom of expression is in conflict with another right or interest, a proportionality test shall be implemented.⁸⁶² This allows a court, in the inspiration of the 'Limitations Clause',⁸⁶³ to assess the right in its entirety. This will be done to determine an objective and justifiable limitation to a right that is secondary to the preceding right, assessed upon a case-by-case basis.

The nature of the right to freedom of expression is clearly not absolute, yet the outlined prohibitions of section 16(2) do little to endorse what may be permissible as a fair representation of one's freedom of expression where minority sexual expressions arise.⁸⁶⁴ South Africa has had a troubled past in the recognition of LGBT rights, yet steadily shows its growing support of these minority groups by enforcing their shared rights of dignity and equality, giving flight to their freedom of sexual expression.⁸⁶⁵ The freedoms of sexuality afforded to minority sexual groups, in light of their vulnerabilities within society,⁸⁶⁶ are protected under the constitutional dispensation.⁸⁶⁷ Freedoms of sexuality also find safeguard in

⁸⁵⁹ Section 36(1) of the Constitution of the Republic of South Africa.

⁸⁶⁰ Oosthuizen 'A constitutionalised perspective on freedom of artistic expression' (2001) 261.

⁸⁶¹ Section 36(1) of the Constitution.

⁸⁶² H. Jurgens "Investgating the Conflict between Freedom of Religion and Freedom of Expression under the South African Constitution " (Masters thesis, University of Cape Town, 2012) 79-80.

⁸⁶³ Section 36(1) of the Constitution.

⁸⁶⁴ P. De Vos and J. Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *The South African Law Journal* 797.

⁸⁶⁵ A. Rosenbloom 'LGBT discrimination in South Africa' (2014) 5 *Kaleidoscope International* 54.

⁸⁶⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (9 October 1998) at paras 25 and 128.

⁸⁶⁷ Rosenbloom 'LGBT discrimination in South Africa' (2014) 59.

provisions of non-discrimination and equality concerning the right to,⁸⁶⁸ *inter alia*, freedom of expression.⁸⁶⁹

Those that partake in sadomasochistic activities may be judged as a minority sexual group and deserving of a heightened degree of protection by the law in the safeguarding and realisation of their fundamental rights. Alas, the scarcity of legal recognition over this sexual practice does little to support the South African law's definitive standpoint if such a dispute arises. The nature of sadomasochism is to express physical violence in the attainment of sexual gratification.⁸⁷⁰ By the application of section 16(2) of the Constitution,⁸⁷¹ the causing of violence in the exercising of one's expression will allow for a limitation of that freedom. Additionally, an expression that causes, or entices, harm within the public will also be limited. Therefore, the possible expression of sadomasochism within the South African legal sphere immediately fails within the textual analysis of section 16(2) itself,⁸⁷² based on the violence of the practice and the harm that is entrenched between partners.

However, the immediate curtailing of sadomasochism as a form of sexual expression should not be applied unanimously by a blanket-like imposition. As accounted for in Chapter 2 of this dissertation, there are variant forms of sadomasochism that involve differing scales of violence and harm. Some of these practices are accepted as lawful manifestations of consensual violence within the contemporary spheres of the world. Therefore, an objective inquiry into the expression of sadomasochism should be conducted upon the merits of each case if found before a South African court. If sadomasochism were to be interpreted as an expression of sexual intercourse, it is probable that the limitations of section 16(2) would not be applicable, as such would constitute a sexual expression and not one of violence.⁸⁷³ Ultimately, the distinction of the practice of sadomasochism, existing as either a sexual or a violent form of expression, will be hinged upon the investigation of the relevant court upon the merits of the individual case itself.

⁸⁶⁸ De Wet 'Human rights and sexuality - reimagining the language of equality towards transformation in and through education' (2017) 128.

⁸⁶⁹ E.Y. Ako "The Debate on Sexual Minority Rights in Africa: A Comparative Analysis of the Situation in South Africa, Uganda, Malawi and Botswana" (Masters thesis, University of the Western Cape, 2010), 30.

⁸⁷⁰ Fedoroff 'Sadism, Sadomasochism, Sex, and Violence' (2008) 638.

⁸⁷¹ Section 16(2) of The Constitution of the Republic of South Africa.

⁸⁷² Ibid.

⁸⁷³ Bennett 'Sadomasochism under the Human Rights (Sexual Conduct) Act of 1994' (2013) 549.

4.7 Conclusion

The prominence of individual human rights assumes a heavyweight role within the inquiry of courts from both the international and national legal spheres when interpreting a spectrum of legal complexities. Individually, each person enjoys the liberties associated with their inherent rights of human dignity, privacy, and freedom of expression to convey their unique and autonomous will. Autonomy thus exists as a golden thread between the rights that were explored in this chapter, woven into the fabric of these statutory provisions in its omnipresent uniqueness. This, in turn, provides the schematic for the virtue of human dignity; assessing that even if the concept is inherent for every human, a personal, or subjective, reflection of human dignity will also be protected. The right to human dignity oozes into both privacy and freedom of expression, amongst the myriad of other rights.

It is within human dignity that a person may subjectively pursue and express their will, whilst being afforded the necessary privacy to enjoy the culmination of these rights. Upon the chain of explored rights within this Chapter, the ciphering of sadomasochism within these fundamental spheres takes shape. The pursuit of sadomasochism may rightly form the basis of one's human dignity and self-worth,⁸⁷⁴ based on the subjective affinity in the expression of the practice. Secondly, and feeding off the structure established by human dignity, privacy to experience one's autonomous will is a necessary component of one's personality.⁸⁷⁵ Lastly, freedom of expression, significantly influenced by an individual's personal desires, will thrive in a private setting that respects these personality rights in juxtaposition to the allowance permitted by the State. Sadomasochism, dependent on the intensity of the violence expressed by the partners, may exist as a valid representation of a person's freedom of sexual expression.⁸⁷⁶

It comes as no surprise that both the national and international legal systems have implemented legislation and other prerogatives for the enforcement and protection of fundamental human rights. Take, for instance, the Universal Declaration of Human Rights,⁸⁷⁷ whose humble foot-

⁸⁷⁴ See *Laskey, Jagard and Brown v United Kingdom* 1997 (Application No. 21627/93; 21628/93; 21974/93) ECHR 4.

⁸⁷⁵ See *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB).

⁸⁷⁶ See *R v Ghomeshi* 2016 ONCJ 155.

⁸⁷⁷ UN General Assembly "Universal Declaration of Human Rights".

wrappings influenced the European Convention on Human Rights.⁸⁷⁸ This set off a reverberation of shared values of human rights throughout the contemporary legal systems of Europe. So too does the archetype of human rights exist within the Constitutional age of South African law, standing within a colosseum of promised rights under the Bill of Rights.⁸⁷⁹ The extensity of human dignity, privacy, and freedom of expression do not prove to be absolute within a legal system, even if such may promised within legislation. This is immersive within the duality of the balance between personality rights and the compelling interests protected by the State; for laws are codified to uplift that which is open, justifiable, and democratic to a society, not to unfairly erase the rights and freedoms of people.

⁸⁷⁸ Council of Europe "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950).

⁸⁷⁹ Chapter 2 of The Constitution of the Republic of South Africa.

CHAPTER 5: THE VICISSITUDES OF THE PRACTICE OF CONSENSUAL SADOMASOCHISM EXISTING AS A VICTIMLESS CRIME

*“There is no such thing as a victimless crime, and people should be allowed to do as they please with their own bodies and with other consenting adults. If you believe otherwise, then you are an enemy of freedom.” – Michelle Templet, ‘Exodus’ (The Darklight Chronicles).*⁸⁸⁰

5.1 Introduction

The concept of a victimless crime is far from avant-garde within legal systems of the modern world. The difficulty, however, arises in the appropriateness of the criminal sanctions over victimless crimes, for the etymology of the ‘crime’ committed often exists within a shambolic duality between the pillars of law and morality. This chapter will explore the definition of victimless crimes and the variant forms that exist within a legal system. This will then unravel into the safeguarding of public order and morality by the willingness of the criminal law to prosecute actions that have no true victim.

Morality and the law will be inspected in light of the famous Hart-Devlin debate, derived from the ignition of the Wolfenden Report. This approach shall attempt to shed light upon the motives of the criminal law in prosecuting victimless crimes in order to safeguard the morality of the public at large and to prevent wide-scale harm. Ancillary to this, inspiration from the already explored rights to dignity, freedom of expression and privacy will counteract the desired criminal sanctions by the State. This submission will further be supported by the concept of moralism entrenched within the rights of the Constitution of South Africa.

Finally, this chapter will attempt to decipher whether the practice of consensual sadomasochism falls within the ambit of a victimless crime. This will strive to project whether such conduct should be met with immediate criminal sanction, demanded by the values of statutory guides, public policy, and public moralism. This will be construed in light of the societal and legal values of the South African Constitution and that of the international law’s

⁸⁸⁰ M. Templet *Exodus* (The Darklight Chronicles) (2016).

perspectives. If it is found that the definition of sadomasochism should be a recipient to the groupings of victimless crimes, what level of harm upon society must be established to sustain a prosecution under this guise? Further, would the classification of consensual sadomasochism as a victimless crime unjustifiably infringe the rights of the participants?

5.2 Defining a Victimless Crime

To evoke the conceptualisation of a victimless crime, the exploration of the definition of a 'crime' becomes relevant to this concept. Burchell alludes that the general nature of a crime curtails the protected rights and interests of the State or that of another person.⁸⁸¹ This viewpoint avers that a crime brings with it a potential victim, whose rights are infringed by the unlawful conduct of another. Kramer defines the socio-legal construction of a crime as existing within a category of legal creation,⁸⁸² produced and outlined by the State.⁸⁸³ Thus, the State must define what behaviour will constitute a 'crime',⁸⁸⁴ and in turn, provide the criteria in which criminal behaviour shall be interpreted and punished⁸⁸⁵. Therefore, the legal norms, values, and morals of a State will serve within the primary embodiment of the criminal law and its textual outline of crimes. In turn, the clarity of the definition of a crime will unravel into the elements of the specific act itself, as outlined by either statute or common law, bringing into focus the nature of the crime and the appropriate criminal proceedings.⁸⁸⁶

Within the school of Criminology, the once offender-focused inquiry is now expansive within a new sub-branch known as 'victimology'.⁸⁸⁷ This sub-branch was borne from the considerations relating to the infringement of rights suffered by the victim by the unlawful conduct of the offender. This exposes the role of victimology in a new prominence within the framework of the constitutionally oriented criminal justice system of South Africa.⁸⁸⁸ The victim-focus inquiry is an expansive stride that pays homage to the safeguarding of the victim's

⁸⁸¹ Burchell *Principles of Criminal Law* (2013) 9.

⁸⁸² R.C. Kramer 'Defining the concept of crime: A humanistic perspective' (1985) 12 *The Journal of Sociology & Social Welfare* 469.

⁸⁸³ Ibid at 475.

⁸⁸⁴ Ibid at 477.

⁸⁸⁵ Burchell *Principles of Criminal Law* (2013) 3.

⁸⁸⁶ G. Williams 'The definition of crime' (1955) 8 *Current Legal Problems* 107.

⁸⁸⁷ J. Bednarova 'The heart of the criminal justice system: A critical analysis of the position of the victim' (2011) *Internet Journal of Criminology* 4.

⁸⁸⁸ H. Hargovan 'Victimology in South Africa' (2014) 47 *SA Crime Quarterly* 49.

rights by way of victim impact statements and other supporting avenues of protection.⁸⁸⁹ Therefore, the existence of a victim to a crime is part-and-parcel to the unlawful conduct of a criminal offender, and it is the focus of the criminal justice system of South Africa to balance both the rights of the offender and that of the victim respectively.

The term ‘victimless crime’ is ripe with difficulty in satisfying the State’s legal, and moral, definitions of the distinction between the parties to a crime. As explored earlier in this chapter, a crime will involve the infringement of another’s rights; creating a dynamic that outlines an offender and a victim. Further, the commission of a crime surfaces an identifiable victim, or the clear infringement of another’s protected rights, by the unlawful conduct of the offender. Actual harm need not materialise from the unlawful conduct, but the risk of harm must be displayed within the conduct of the offender.

The inspection of the term ‘victimless’ is the absence of a victim, or injured party, to a crime. Thus, if conduct mimics the definition of a crime, yet there is no victim to the offence; surely the complete definition of the crime is not satisfied. The rumination of a victimless crime derives from this orbit, understanding that such an occurrence is probable within certain consensual, and often private, activities between persons. Superficially, a victimless crime may be defined as the willing participation of consenting individuals to an outlined crime, yet no victim, or injury, exists within the dynamic of the offence.⁸⁹⁰ Based on the absence of a true victim, the justification of the criminal law in applying its sanctions appears to be disjunctive to the nature of the ‘crime’ and the consensual, autonomous, nature of the interaction.

Stone builds on the introductory definition of victimless crimes by arguing for the interpretation of its legal resonance.⁸⁹¹ To Stone, the only ‘victims’ that derive from victimless crimes are those that are willing participants to what is considered ‘morally’ divergent criminal conduct by the legislature and common law regimes.⁸⁹² Without a defined or identifiable victim, Stone conjures a relevant juncture into the assessment of a perceived ‘crime without victims’ by highlighting that it is the legislature’s prosecution, which inevitably victimises the consensual and autonomous conduct of the participants. A criminal prosecution supports the criminality

⁸⁸⁹ Burchell *Principles of Criminal Law* (2013) 8.

⁸⁹⁰ J.F. Winterscheid ‘Victimless crimes: The threshold question and beyond’ (1977) 52 *Notre Dame Law Review* 1995.

⁸⁹¹ K.L. Stone “The Decriminalisation of Victimless Sexual Offences” (Masters thesis, University of Natal, 1996).

⁸⁹² *Ibid* 82.

of such conduct, for the consensual actions of the victimless crimes are divergent to the moral values instilled by the legislature.

Hughes,⁸⁹³ in the inspiration of Mill's 'Harm Principle',⁸⁹⁴ assesses the criminal law's stance in protecting against the harm that would infringe fundamental rights entrenched by the State. In light of the Harm Principle, the criminal law's inspection of the unlawful conduct, which causes harm to others, is a valid entry point for the punishment of an offender. However, in contemplation of Mill's Harm Principle, criminal conduct that does not bring harm to others, even if only harmful to the offender alone, should not be the recipient of the criminal law's interference.⁸⁹⁵ It is essential to note that victimless crimes often involve the consensual interaction of two, or more, persons. Thus, consensual actions that administer harm upon the consenting parties sway from the ambit of what was considered as a 'self-regarding' act by Mills.⁸⁹⁶

However, Saunders asserts that Mill's Harm Principle accommodates for the extension of the 'self-regarding' criminal act concerning consensual harm within a victimless crime.⁸⁹⁷ The assessment of the malleability of the term 'self-regarding' may be applicable to the unified actions of the consenting parties.⁸⁹⁸ This argument is substantive in its worth, so long as no harm, or infringement, befalls the rights of another who is not a party to the consensual relationship. Therefore, a 'self-regarding' criminal act, even if unlawful in the outline of State statute, theoretically does not infringe the rights of others and is without a victim.

Schur identifies another plateau within the content of a victimless crime,⁸⁹⁹ putting forward that such a definition is satisfied within the trade of substances and items, or in the commission of personal services,⁹⁰⁰ that are forbidden by the laws of the State.⁹⁰¹ The criminal law's statutory

⁸⁹³ B. Hughes 'Strictly taboo: Cultural anthropology's insights into mass incarceration and victimless crime' (2015) 41 *New England Journal on Criminal and Civil Confinement* 49.

⁸⁹⁴ J.S. Mill *On Liberty*, 4 ed.(1869).

⁸⁹⁵ B. Saunders 'Refomulating Mill's harm principle' (2016) 125 *Mind* 1006.

⁸⁹⁶ Mill identified that 'self-regarding' acts of a criminal nature do not harm the rights of others, nor is there a direct correlation between a 'self-regarding' criminal act and the curtailing of another's rights. To Mill, a criminal act will cease to be 'self-regarding' when its nature becomes entangled with the rights of others. Therefore, a 'self-regarding' criminal action exists exclusively within the personal realm of the offender.

⁸⁹⁷ Saunders op cit note 895 above at 1010.

⁸⁹⁸ Ibid 1011.

⁸⁹⁹ E.M. Schur *Crimes without Victims: Deviant Behavior and Public Policy: Abortion, Homosexuality, Drug Addiction* (1965).

⁹⁰⁰ The soliciting of the services of a sex-worker fit this definition of a victimless crime.

⁹⁰¹ As cited in K. Jaishankar 'Sexting: A new form of victimless crime?' (2009) 3 *International Journal of Cyber Criminology* 23.

ban and criminalisation of the use of narcotics moulds the consideration of an appropriate example of a victimless crime.⁹⁰² Meyer argues that:

*'[The] prohibition of drugs simply creates an underground economy that cannot be taxed, controlled or regulated. It causes corruption and fills the prisons with people found guilty of a victimless crime.'*⁹⁰³

Thus, from this submission, the use of dependence-producing substances may be defined as a victimless crime, for the harm incurred is personally related to the offender alone.⁹⁰⁴ Yet, the State punishes an offender derived from their contrary indulgence with the proscribed substances. This submission will be explored at a later stage within this chapter.

The prosecution of victimless crimes appears to derive from the realms of legal, social, and moral prerogatives that prove to be ingrained within the values of an open and democratic State. This, however, exists as a reflective commentary on the concept of a victimless crime, for 'self-regarding' actions that do not infringe the rights of others are deemed to be punishable on the pretence that such may cause moral harm to society. Drug usage and trade may rightly send shockwaves through the public, yet the justification of prosecuting the practice treads upon a quagmire of conflicting jurisprudential views. The central question that inflates the concept of victimless crimes is whether the perceived immoral behaviour justifies a criminal prosecution by the State.

Furthermore, where the practice deserves a lesser punishment and not that of a criminal sanction would ultimately depend on the extent of the harm unto others. Rightly, the State may argue that a prosecution against a particular practice, even if there is no true victim, is a deterrence against actions that would cause the moral decay of society. Whether this alone is sufficient to instil an intrusion into the private and consensual realm of adult interactions will be explored in the inspiration of the findings of the Wolfenden Report and the Hart-Devlin debate.

5.3 The Wolfenden Report and the Hart-Devlin Debate: Precursors for the Reflections of Victimless Crimes

⁹⁰² Drugs and Drug Trafficking Act 140 of 1992.

⁹⁰³ R. Meyer 'Decriminalisation of drugs' (2011) 101 *South African Medical Journal* 428.

⁹⁰⁴ Section 4 of the Drugs and Drug Trafficking Act 140 of 1992.

5.3.1 Setting the Stage: The Wolfenden Report

Long after a decade from the close of World War II, the ‘Report of the Committee on Homosexual Offences and Prostitution’,⁹⁰⁵ herein referred to by its colloquial name ‘*The Wolfenden Report*’, proved to be a pivotal piece of legal literature that juggled the progressive notions of law and morality within England. As a prelude to the Hart-Devlin Debate, it is important to note that The Wolfenden Report investigated the influx of criminal prosecutions against the crimes of, *inter alia*,⁹⁰⁶ homosexuality and prostitution (sex work).⁹⁰⁷ The primary objective of the Wolfenden Report was to determine whether these perceived ‘immoral’ displays of conduct might be legalised within the contemporary legal sphere of England.

An equitable reconciliation was sought in consultation with the criminal law’s stance and its prosecution of these ‘morally divergent’ crimes. The Wolfenden Report resolved with the understanding that the law should not criminalise private, consensual activities between adult partners based on the perceived immorality of the act.⁹⁰⁸ The significance of this conclusion brings a two-fold submission; firstly, that the law should not criminalise private, consensual interactions between consenting adults, and secondly, that the criminal law should not be moulded by a unanimous moralistic code that trumps the morally divergent behaviour of others. The first consideration is crystalline in its socio-legal purport; however, the submission of the second consideration requires some deliberation upon the expansion of immorality in the law.

The Wolfenden Report highlighted the moralistic backbone within the criminal law’s punitive stance, which lobbied for the prosecution of immoral conduct within the legal system of England. The perspective of divergent and morally questionable behaviour must be systematised into actions that harm the rights of the public and actions that do not. This submission encapsulates the rights to privacy and freedom of expression, convening in a flurry of autonomy rights that are inherent to all persons. Clearly, the progressive stance of the criminal law, in protecting individual liberty, added a sizeable claim for morality to take a lesser role in the contemporary assessment of perceived ‘immoral behaviour’. This stance allowed for personal autonomy to flourish between personal interactions. The substantive

⁹⁰⁵ *Report of the Committee on Homosexual Offences and Prostitution*.

⁹⁰⁶ *Ibid* at 11 at para 17.

⁹⁰⁷ *Ibid* at 79 at para 222.

⁹⁰⁸ *Ibid* at 25 at para 62.

involvement of the criminal law, if fuelled by an envisioned moral-template, proved to be ancillary to the rights of individual liberty and privacy within England.

Therefore, any consensual and private action that does not harm the rights of others, even if morally distasteful to some, should not be the recipient of a criminal sanction. This is a definitive attempt to minimise victimless crimes that are created by the legislature and existent within the common law. The private realm of consensual adult sexual interactions, which facilitates for both possibilities of morality and immorality, should be tempered by the autonomous decisions of the partners and not the criminal law, or the social convictions of the community. This, however, does not condone private immorality and the widespread infringement of another's rights. A private and consensual homosexual interaction appeared to fall within a practice that did not infringe the rights of the public at large and should no longer be classified as a criminal offence, based on its victimless nature.

The recommendation by the Wolfenden Report was to place a positive duty of care upon the consenting adult partners engaged in alleged 'immoral behaviour'. This derived from the ideology of preventing against harm from befalling the rights of others in the community who are not a party to the consensual relationship. Where homosexuality is practised in private, between consenting 'mature agents',⁹⁰⁹ it was not the recommendation of The Wolfenden Report to advocate for the criminalisation of such. Along the same strides as the recommendations for private and consensual homosexuality, it was the submission of The Wolfenden Report that prostitution (sex work) in private should inhabit a similar position. Morality thus should not influence a criminal sanction purely on the basis that a practice falls within the boundaries of a minority group within society.

5.3.2 The Essence of the Hart-Devlin Debate: Broadening the Fold for the Interpretation of Victimless Crimes

The findings of the Wolfenden Report enjoyed no respite as the clash of ideologies between Devlin and Hart ensued in its wake. The debate had scorched through the jurisprudential landscape of the criminal law and its ties with the concept of societal morality. The question at the heart of the debate was as follows: should the criminal law consider immoral actions as a

⁹⁰⁹ Ibid at 24 at para 61.

criminal offence?⁹¹⁰ Thus, where the criminal law sees fit to criminalise consensual immoral conduct between adults, this would serve as a flagship for the existence of victimless crimes within a legal system. The exploration of the position of Patrick Devlin,⁹¹¹ and his disregard for the findings of the Wolfenden Report, will be shed by virtue of his key submissions within the debate. Contrasting Devlin's perspective, the views of H.L.A Hart will be deciphered in light of his key submissions that support the entrenchment of personal liberty and freedom; rights that cannot be influenced by a unanimous moral code.⁹¹²

Devlin, and his profound affinity for the interlocking of law and morals, proposed that it is in the coexistence of law and morality that the protection of society will occur. To Devlin, the influence of a common societal morality must coax the criminal law to prosecute behaviour that would cause the moral deterioration of the society.⁹¹³ Further, Devlin submits that the intangible bonds of common morality and belief are polymerised to form a unified system of morality that is understood by the 'feelings' of a reasonable man within society.⁹¹⁴ This outlook proposes that morality exists within a model that is collectively shared by the members of society as a paragon value system, based on its intrinsic unanimity. Even though cognisance was given to Mill's Harm Principle, Devlin argues that such is one of many guides within the labyrinth of jurisprudence that may be considered in light of the findings of The Wolfenden Report.⁹¹⁵

Devlin further submits that the safeguarding of morality will be hinged upon the determination of whether immoral conduct has occurred in the objective analysis of a reasonable man within the society. This will be interpreted by the assessment of the impact of the harm from the 'immoral behaviour' and its infringement upon the collective morality of society,⁹¹⁶ perceived purely from the feelings of a reasonable man.⁹¹⁷ Devlin is of the belief that even private acts of immorality are sufficient to cause the withering of public morality and these must be the recipient of the criminal law's sanctions. Thus, Devlin proposes that the value of societal

⁹¹⁰ G. Dworkin 'Devlin was right: Law and the enforcement of morality' (1999) 40 *William and Mary Law Review* 927.

⁹¹¹ Patrick Arthur Devlin (1905 – 1992).

⁹¹² Herbert Lionel Adolphus Hart (1907 – 1992).

⁹¹³ M.K. Radebe "The Unconstitutional Criminalisation of Adult Sex Work" (Masters thesis, University of Pretoria, 2013), 11.

⁹¹⁴ J.H. Wade "Morals and the Enforcement of Values: An Analysis of the Hart-Devlin Debate" (Masters thesis, University of British Columbia, 1971), 3.

⁹¹⁵ Ibid at 10.

⁹¹⁶ Dworkin op cit note 910 above at 931.

⁹¹⁷ Radebe op cit note 913 above at 11.

morality endures as an instrument that may be applied practically by the imposition of a criminal sanction, in both the public and private spheres.⁹¹⁸ This must be considered objectively by the criminal law and the regulation of immoral behaviour to be assessed on the facts of each individual dispute. Therefore, Devlin argues that harm from immoral conduct is sufficient to infringe the collective safety of society and does not exist as an isolated harm inflicted between individuals. Society is allegorised as a complete entity, one that is deserving of a moralistic framework that calls for the epitome of legal protection.

Hart, in his contrasting argument, propelled the perspective of Mill's Harm Principle,⁹¹⁹ and compartmentalised the dynamic of morality within society into 'positive morality' and 'critical morality'.⁹²⁰ 'Positive morality' correlates to the general affinity and acceptance of morality within an identifiable social group.⁹²¹ 'Critical morality', however, serves as a definitive test to determine the morality of an appropriate social institution and the nature of 'positive morality' within it.⁹²² Hart thus implements the ethos of 'critical morality' in his submissions within the debate.

Devlin had attempted to show the correlation between law and morality, calling for the importance of moral rules and desired behaviour from members of society,⁹²³ in order to preserve societal morality. The stance of Hart's position differs, as it seeks to characterise the conflict between the concepts of law and morality whilst advocating for the freedom of individual human liberty within society. This sense of individualism, or analogous autonomy, is remote from the collective morality that is perceived by the feelings of a reasonable man; as was submitted by Devlin.⁹²⁴ To Hart, the law may not instil the enforcement of a 'greater' morality over the actions of individuals, unless the actions exist as a source of harm to others.⁹²⁵ Devlin's argument had stressed that a reasonable man is capable of understanding social morality by virtue of intrinsic moral justice, yet Hart is not willing to assume this jingoistic possibility as a quality that is inherent to all people.⁹²⁶

⁹¹⁸ Dworkin 'Devlin was right: Law and the enforcement of morality' (1999) 932.

⁹¹⁹ Mill *On Liberty*.

⁹²⁰ Y. Caron 'The legal enforcement of morals and the so-called Hart-Devlin controversy' (1969) 15 *McGill Law Journal* 9, 10.

⁹²¹ Ibid.

⁹²² Ibid at 27.

⁹²³ Ibid at 21.

⁹²⁴ Ibid.

⁹²⁵ Wade "Morals and the Enforcement of Values: An Analysis of the Hart-Devlin Debate" (1971) 7.

⁹²⁶ Ibid at 12.

To Hart, perceived ‘immoral’ private acts, which may be practised by a few individuals of society, should not suffer the unanimous scrutiny of an overarching social model of morality. This submission is a manifestation of the isolation demanded between law and morality and the proposed deviation of the monopoly held by the viewpoints of the majority, sufficient to curtail the fundamental liberties of society as a whole. Hart argues that Devlin’s cumulative ‘feelings test’,⁹²⁷ alleged to be intrinsic to a reasonable man within society, must be abrogated based on its disjunctive limitations to the individual liberties of all humans within society. Therefore, Hart asserts that the paternalism of morality is unjustified in the application of the law unless the action in dispute can be proven to cause an identifiable harm to society.

This reflects Hart’s primary argument and echoes the findings of The Wolfenden Report in its breakdown of the victimless crimes of homosexuality and prostitution. Further, Hart expresses his test for harm that accounts for a physical manifestation of the harm from the perceived immoral conduct.⁹²⁸ If no physical manifestation of harm occurs from the alleged ‘immoral conduct’, Hart would argue that such conduct is not deserving of State criminal sanction. Therefore, it is in the infringement of the rights of the State that will allow for a primary entry point for the criminal law’s talons, and not the collective influence of societal morality. Hart is clearly a champion of individual freedom and liberty, deriving heavily from the vestiges of legal paternalism. Hart remains a jurist who is unconvinced that a single immoral act, committed in the private confines of adult interaction, would cause the fall of society as a whole.

In conclusion, Hart’s submissions elate individual human liberty, self-determination, autonomy, and freedom. It is within these concepts that the criminal law would find an appropriate guide when interpreting a victimless crime that has occurred within a contemporary legal system. This, however, is not to say that Devlin stands as the antagonist of individual freedom and liberty.⁹²⁹ To the contrary, Devlin’s argument wishes to maintain the freedom of society as a whole by the utmost safeguarding of societal morality. At its core, Hart understands that morality is a hereditary phenomenon within a civilised society, yet believes that the principle of individual liberty and freedom must be entrenched to shape and guide such morality.

⁹²⁷ Ibid.

⁹²⁸ Ibid at 24.

⁹²⁹ Ibid at 32.

The position of the Wolfenden Report had amassed a throne of jurisprudential strides for the assessment of victimless crimes. The clash of ideologies between Hart and Devlin exists within a storm of differing theories in the positioning of the criminal law and its correlation with perceived ‘immoral’ private activities. It is submitted that the debate is a feast of abstract morals in conflict with individualism, yet one that should not allow for the invitation of the criminal law into the private spheres of adult interaction. The Hart-Devlin debate proves that the criminal law’s bond with morality is a dance with the prerogative of mitigating harm within society. Therefore, progressive winds of legislative development allowed for the detachment of the criminal law from the perceived ‘immoral’ conduct of homosexuality and prostitution within the English legal sphere. However, this proves to be a glacial dream for the complete rooting out of victimless crimes in society, as such will be dependent on the nature of the crime and its rippling effects of harm.

5.4 Victimless Crimes from the South African Perspective: Reconciling Morality with Legality

The criminal law of South Africa has been utilised in the interpretation of morality when assessing victimless crimes. Take for instance its implementation in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁹³⁰ outlining the considerations of homosexuality and the criminalisation of the practice of sodomy between consenting men. The Constitutional Court asserted that the criminalisation of consensual homosexual behaviour, which involved sodomy, proved to be deviant to the Constitutional rights of equality and privacy.⁹³¹ It was also submitted that it was not in the nature of the Bill of Rights to spawn victimless crimes in the lawful enjoyment of one’s personality rights.⁹³² Thus, homosexuality inhabited the right to sexual equality,⁹³³ which could not suffer unfair discrimination from the criminal law. Male rape, as accounted for by the Constitutional Court, will be viewed in the context of the crime of rape itself.⁹³⁴ The offence of male rape would be subject to the criminal

⁹³⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (9 October 1998).

⁹³¹ *Ibid* at para 108.

⁹³² *Ibid* at para 109.

⁹³³ Section 9(3) of the Constitution of the Republic of South Africa.

⁹³⁴ *National Coalition for Gay and Lesbian Equality* 1998 *supra* note 930 at para. 70.

law's sanctions in assessing the elements of an unlawful and non-consensual sexual penetration.

However, it was the understanding of the Constitutional Court that consensual homosexual activities should not suffer from the same criminal sanctions imposed by the common law crime of sodomy. This would constitute a clear infringement of a protected form of sexual expression that is endorsed by the Constitutional regime of South Africa.⁹³⁵ Clearly, criminalisation of sodomy, practised within a private and consensual homosexual relationship, would be a clear-cut example of a victimless crime. To the Constitutional Court, the morality of homosexuality should be protected by the Constitutional disposition of the law, swaying from the prior influences of the common law and the out-dated morality models of a bygone past. The case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* proves that the criminal law may become entangled with disputes of 'immoral behaviour'; that which is sufficient to cause moral disgust amongst some groups within society. However, the operation of law treads delicately upon the precipice between the legal regulation of perceived 'immoral' private conduct and the possible infringement upon constitutionally protected rights by the implementation of a criminal sanction.⁹³⁶

In reflection, it is evident that the existing laws on sodomy had adverse effects upon the Constitutional rights of gay men that engaged in private consensual homosexual activities.⁹³⁷ Any prosecution inspired from the ambit of such sodomy laws, regarding consensual homosexual activities, would produce a victimless crime. The argument of prosecuting the perceived 'immoral' behaviour of a minority group in society proved unconstitutional, therefore invalidating the laws of sodomy.⁹³⁸ Interestingly, the Constitutional Court highlighted the acceptance of morality within the criminal justice system of South Africa, yet limiting its applicability by submitting the following:

'A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality

⁹³⁵ Ibid at para 85.

⁹³⁶ Radebe "The Unconstitutional Criminalisation of Adult Sex Work" (Masters thesis, University of Pretoria, 2013) 4.

⁹³⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (9 October 1998) at para 23.

⁹³⁸ Ibid at para 37.

*which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.*⁹³⁹

From this submission, it is clear that the moral value system created by the Constitution should serve as the arbiter for the implementation of the law, or for the creation of new laws. A broad and exclusive South African morality is created by the Constitution and allows for a coherent perception of morality within the society. This singlehandedly renders Devlin's views as invalid within the Constitutional age of South Africa. Radebe asserts that Devlin's argument of a broad societal moralism should be 'treated with caution'.⁹⁴⁰ for a far sweeping moral tenet would have crippling effects upon the Constitutional rights of minority groups. This notion of a 'minority group' is used broadly to accommodate for the various religions, customs, genders, and sexual orientations of certain members within society.⁹⁴¹ In the perspective of the right to equality, as promised under the South African Constitution,⁹⁴² Devlin's belief of a collective morality exists in disregard for the equality of the internal morality of minority groups.

It is essential for the law to value and respect the right to freedom of expression and for a person's liberty to be augmented within their personal beliefs and opinions.⁹⁴³ Yet, some beliefs and opinions may be harmful to society and contrary to the laws of the State. Thus, this consideration exists separately to the shared beliefs that are unanimous across most social groups, such as the prevention of physical violence and serious harm unto others. It is submitted that morality exists in different forms and ethical considerations between people, yet there are some facets of this illusively difficult concept that inhabit a neutral value system. The Constitution creates an over-arching 'common' morality for the South African people by the sanctity of the Bill of Rights and the specific guides to personhood that demand a reciprocal obligation of care from other members of society.⁹⁴⁴ This would serve as the quintessence of the morality of the South African public; that which is neither restrictive over the lawful practices of minority groups, nor departing from the incentive of the criminal law's stance in prosecuting unlawful behaviour.

⁹³⁹ Ibid at para 136.

⁹⁴⁰ 'The Unconstitutional Criminalisation of Adult Sex Work' (2013) 11.

⁹⁴¹ K.L. Stone "The Decriminalisation of Victimless Sexual Offences" (Masters thesis, University of Natal, 1996) 78.

⁹⁴² Section 9 of the Constitution of the Republic of South Africa.

⁹⁴³ Ibid, sections 15 and 16 of *ibid*.

⁹⁴⁴ Ibid chapter 2.

Therefore, law and morality cannot always run in concurrent streams and may ultimately endure as conflicting ideals.⁹⁴⁵ Devlin's reasonable man test within society is problematic in its interpretation within South Africa, for society is compartmentalised into multiple facets of unique social groups that inhabit a plethora of moral perspectives. To combat Devlin's approach, Stone states that:

*'Moral pluralism is an important consideration which would assist in ensuring that no singular morality is presumed to be more appropriate than another.'*⁹⁴⁶

The South African Constitution inevitably propels the concept of moral pluralism within the legal sphere and allows for a flurry of personal beliefs to be recognised. It is evident that a duality between moralities may only exist if such moralities are not at loggerheads. This would point toward the general direction that the exposure of a conflicting morality would be sufficient to spark a widespread moral turbulence within other groups,⁹⁴⁷ based on the assessment of the harm one morality may have on another. However, this consideration is riddled with ambiguity, for social interactions are part-and-parcel of contemporary human existence. Therefore, moral tolerance within the societal sphere is encouraged by the South African Constitution and its notion of a free, open, and democratic society.⁹⁴⁸

Moral pluralism alludes to the coexistence of differing moralities that dwell in legal certainty within the laws of the State. The concept radiates a profound support for the Constitutional ethos of equality and acceptance between different peoples within South Africa. Further, it is evident that the aforementioned rights inhabit the upper echelons of the concept of morality, proving the interlocked nature of human rights to the fulfilment of morality. The 'Limitations Clause' of the Constitution,⁹⁴⁹ sanctions of the criminal law, and other supporting pieces of legislation will determine the interpretation of differing moral ideologies and whether morality may be limited by the operation of the law. An unjustified limitation upon a moral practice, which inhabits the lawful boundaries of protected rights, would prove to be unconstitutional and invalid within South Africa. Ackerman J, in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* supports this viewpoint by stating:

⁹⁴⁵ "The Decriminalisation of Victimless Sexual Offences" 69.

⁹⁴⁶ Ibid at 86.

⁹⁴⁷ Ibid at 79.

⁹⁴⁸ Section 39(1) of the Constitution of the Republic of South Africa.

⁹⁴⁹ Section 36(1).

*'The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate [limitation].'*⁹⁵⁰

It is vital for the criminal law to take into consideration the values of the Constitution and the safeguarding of minority rights within its assessment of a possible limitation of morality. Numerous constitutional rights populate morality as a concept, and thus, any limitation upon one right may rightly extend upon the others. In addition, the criminal law should remain impartial and unhindered by the influence of a broader societal morality in an attempt to observe all variants as equals. The ultimate focus would be an equitable resolution of the perceived immoral act, determining whether a criminal sanction would unjustifiably infringe constitutionally protected rights. This would stem from the degree of the harm that emanates from the practice in question how said harm infringes Constitutional rights. Where constitutional rights are infringed by morality, it is probable that the criminal law will be justified in limiting morality.

Consensual acts often linger within victimless crimes that exist by an empowering piece of legislation. The case of *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* (herein referred to as the *Teddy Bear* case) was one that explored the unfettering of the victimless crime of underage consensual interactions amongst certain categories of adolescent children.⁹⁵¹ Initially, sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act imposed criminal liability upon children under the age of 16 that engaged in consensual sexual activities.⁹⁵² To remedy this victimless crime,⁹⁵³ the Constitutional Court ruled that these sections were inconsistent with the rights to dignity and privacy of the consenting adolescent children, along with the undermining of the 'best interests of the child'.⁹⁵⁴

The Constitutional Court further bolstered the claim for the sanctity of human dignity when it was said that:

⁹⁵⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (9 October 1998) at para 37.

⁹⁵¹ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC).

⁹⁵² Sections 15 and 16 of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁹⁵³ *Teddy Bear Clinic for Abused Children* supra note 951 at para 117.

⁹⁵⁴ Section 7 of the Children's Act 38 of 2005; Section 28(2) of the Constitution.

*'There can also be no doubt that the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents.'*⁹⁵⁵

Further, the limitations of the criminal law's sanctions upon the consenting adolescents failed to establish a congruent finality of deterrence regarding any future sexual interactions between adolescents.⁹⁵⁶ Thus, the limitation upon the rights to dignity and privacy proved to be unconstitutional by way of an unreasonable and unjustifiable limitation of rights.⁹⁵⁷ The position of non-consensual sexual activity between adolescent children, or sexual intercourse between an adult and a child, remained unchanged and still subject to the sanctions of the criminal law.⁹⁵⁸ Additionally, sexual interactions between consenting adolescents that are separated by a two-year, or more, age gap would still impose criminal liability upon the older partner.⁹⁵⁹ The judgement of the *Teddy Bear* case binomially rebukes the victimless crime created by the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, whilst allowing for the categorised freedom of sexual interactions between adolescents aged 12 – 16.⁹⁶⁰

In reflection of the *Teddy Bear* case, it is submitted that the harm administered by the implementation of the statutory provisions,⁹⁶¹ which were found to infringe the Constitutional rights of adolescent children, outweighed the perceived internal harm that existed within consensual sexual activities of adolescents. Therefore, victimless crimes within South Africa appear to be eclipsed by the implementation of the Constitutional prerogatives and a holistic understanding of the rights of the aggrieved party. A test regarding the nature of the harm from the victimless practice should be conducted within the criminal law's inquiry of the specific victimless crime. Firstly, this should account for the impact of the harm upon the consenting individuals, and secondly, the threat such a harm may pose to society; derived from the possible exposure of the public to the practice.

Perhaps the deliverance from victimless crimes may one day encompass the practice of sex workers, engaging in commercial sex, within South Africa. This would demand a surge of

⁹⁵⁵ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) at para 55.

⁹⁵⁶ *Ibid* at para 87.

⁹⁵⁷ *Ibid* at para 101.

⁹⁵⁸ *Ibid* at para 113.

⁹⁵⁹ A. Strode et al 'Reporting underage consensual sex after the *Teddy Bear* case: A different perspective' (2013) 6 *South African Journal of Bioethics and the Law* 46.

⁹⁶⁰ *Ibid.*, 47.

⁹⁶¹ Sections 15 and 16 of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

support from public policy, along with a contemporary outlook from the legislature regarding the currently illegal practice of sex work.⁹⁶² However, to overcome the legislative anomaly of victimless crimes, the legislature itself must confront all avenues of the perceived immoral behaviour root and stem. The State, inspired by an ensemble of legal literature, should draw an equitable line between private morality and public morality. By virtue of moral pluralism, the State should refrain from endorsing a definite private morality and avoid the intrusion within the confines of individual intimacy.⁹⁶³ This reflection, however, is not absolute and the State may be justified in limiting the practices of private morality if such conduct promises a reasonable degree of moderate, or imminent, harm within society.⁹⁶⁴ Nevertheless, the deep civic values of morality, ingrained within the South African Constitution, serve as the guiding lights for State intervention in the review of victimless crimes.⁹⁶⁵

Perhaps South Africa is orbiting toward a broad attempt in decriminalising specific victimless crimes, starting with the personal and private cultivation and use of cannabis. This was reflected in the recent 2018 Constitutional Court judgement,⁹⁶⁶ involving what was coined as the ‘dagga couple.’⁹⁶⁷ The judgement reflects the vast infringement of the criminal law’s provisions upon, *inter alia*, the right to privacy. Zondo ACJ stated that:

‘In my view, as long as the use or possession of cannabis is in private and not in public and the use or possession of cannabis is for the personal consumption of an adult, it is protected. Therefore, provided the use or possession of cannabis is by an adult person in private for his or her personal consumption, it is protected by the right to privacy entrenched in section 14 of our Constitution.’⁹⁶⁸

This is a sterling manifestation of the breaking-down of the often-practised ‘victimless crime’ of the use of cannabis within South Africa. This approach is solidified within a defined statutory manner in the inspiration of the Constitutional values afforded to all citizens.

⁹⁶² In the case of *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) (9 October 2002), the Constitutional Court applied a conservative moralistic stance in the criminalisation of commercial sex. The ambit of the precedent extends to commercial sex within both the public and private confines of adult interaction. However, it is noted that the main consideration of the Court in the *Jordan* case was to interpret the rights of the parties involved and to determine an adequate extent of a limitation of such rights.

⁹⁶³ *Ibid.* at para. 103.

⁹⁶⁴ Radebe "The Unconstitutional Criminalisation of Adult Sex Work" (2017) 4.

⁹⁶⁵ *S v Jordan* supra note 962 at para 104.

⁹⁶⁶ *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* (CCT108/17) [2018].

⁹⁶⁷ L. Persens "Battle Is Far from over, Says Dagga Couple," *Eyewitness News*, Retrieved from <https://ewn.co.za/2018/09/21/our-battle-is-far-from-over-says-dagga-couple>. (accessed on September 22, 2018).

⁹⁶⁸ *Minister of Justice and Constitutional Development v Prince* supra note 966 at para 100.

Evidentially, the Constitutional Court did not hold the views of a broad moralistic code to overpower the personal moral practices of those that engage in the private use of cannabis. The impact of the harm of the practice is clearly confined to the private realm of adult interactions and any public exposure of such will not be awarded the same protection as that of the private sphere.

5.5 '*Something in the Way*' - The Susceptibility of Consensual Sadomasochism Falling within the Definition of a Victimless Crime

5.5.1 The Position of England and Canada

The practice of private consensual sadomasochism lingers within multiple boundaries of legal contemplation. Firstly, this includes the clamour for the practice's sanctity within the private sphere, which is threatened by the potential intrusion of the criminal law. Secondly, the autonomy rights that support the private sphere of human interaction may illuminate the disambiguation of whether consensual sadomasochism is truly sexual, or violent, within its nature.

Thus, the criminal law is tasked with drawing an equitable line between the restriction of personal autonomy and its subservience to the compelling factors of preventing against dangerous consensual activities. If the facts of *R v Brown* were consulted within a contemporary reflection, perhaps the approach adopted by the House of Lords may have yielded broader definitions regarding the public interest, personal autonomy, morality and the right to privacy.⁹⁶⁹ It is submitted that the victimless nature of consensual sadomasochism may not always exist, for the consenting partners themselves dictate the intensity of harm within each consensual sadomasochistic encounter. This, in turn, shapes the resolve sought by the criminal law to be reflective of the harm that is inflicted between the partners in the specific relationship. Where serious, or grievous, bodily harm is intended and inflicted, it is likely that a prosecution will be brought forward.

In the absence of any specific legalisation that outlines consensual sadomasochism as a criminal offence, the general nature of the practice falls within the realms of assault. The

⁹⁶⁹ *R v Brown* [1994] 1 AC 212.

criminal law of England, Canada and South Africa respectively differentiate between variant forms of assault. As a general outline, the crime of assault may occur in common assault, or an assault occurring in with intention to do grievous bodily harm (actual bodily harm).⁹⁷⁰ To sustain a prosecution for the crime of assault, an intentional and unlawful application of force, or a threat of such force, must be present in the actions of the offender.⁹⁷¹ Further, the satisfaction of the elements of assault takes flight where there is an unwarranted application of force upon the victim.

Clearly, the uniqueness of individualistic consensual sadomasochistic activities may bring different forms of physical harm, inspired by the consent of the partners. This is problematic, for the crime of assault is seemingly contradicted, based on the existence of the element of consent to the harm by the alleged ‘victim’. However, as explored in the landmark judgement of *R v Brown*,⁹⁷² consent must fail where a specific degree of harm arises within a consensual relationship that is contrary to the public interest. Thus, the public interest endures as a resounding and stringent assessor, even within the commission of private consensual harm. This limits individual autonomy by controlling the ambit of consent in order to safeguard against a prohibited degree of harms arising.

The recent English judgement of *R v BM* is worth consideration.⁹⁷³ The judgement referred to *R v Brown* and endorsed the resounding influence the latter has had within the legal sphere of England regarding the crime of assault in consensual sadomasochism.⁹⁷⁴ The facts of *R v BM* involved a tattoo artist known as ‘BM’,⁹⁷⁵ who was charged with three counts of actual bodily harm.⁹⁷⁶ The nature of committed harm fell within the outline of Section 18 of the Offences Against the Person Act.⁹⁷⁷ The appellant, a trained tattoo artist and body piercer, had acquired the consent of his customers to perform body modification; although he did not possess any medical training, nor were the modification procedures performed under aesthetic.

The principles entrenched in *R v Brown* were used to limit the defence of consent to the charges of wounding with intention to commit grievous bodily harm. Even though the wounding which

⁹⁷⁰ Burchell *Principles of Criminal Law* (2013) 580, 586.

⁹⁷¹ Ibid.

⁹⁷² *R v Brown* [1994] 1 AC 212.

⁹⁷³ *R v BM* [2018] EWCA Crim 560.

⁹⁷⁴ *R v Brown* [1994] 1 AC 212.

⁹⁷⁵ *R v BM* [2018] EWCA Crim 560.

⁹⁷⁶ The appellant had removed a customer’s ear; removed a customer’s nipple; and had split the tongue of a customer in order to resemble that of a reptile.

⁹⁷⁷ Section 18 of the Offences against the Person Act 1861.

was caused by the body modification procedure was consensual, the Court of Appeal was alive to the inherent risk and danger of the practice being performed by an individual who was not a qualified surgeon. Apart from the absence of the standard methods of surgery, the Court of Appeal noted that the customers of the appellant were not aware of the risks of the procedure, along with any possible complications which may arise. The absence of a regulated system over the practice of body modification did not support the defence of consent to the grievous bodily harm raised by the appellant and proved to be a danger to the interests of the public. Therefore, no social utility was found in the body modification procedure and a prosecution was indeed effected. *R v BM* is reminiscent of *Brown* for it was accepted that in order to consent to bodily harm, the consensual conduct itself must exist within a recognised category of exemption.

It is worth noting that a special exemption may exclude liability for the harm inflicted within consensual sadomasochism and will create a barrier of protection against State interference within the private activities of consenting individuals.⁹⁷⁸ This, as considered in *R v BM*, is the recognition of a social utility within a practice and the tolerance a court may allow to the consensual wounding of a person. However, consensual sadomasochism has found no refuge within an exempted category to the crime of assault, based on the unpredictability and severity of the harm that may potentially exist within the consensual dynamic.

To the House of Lords in *Brown*,⁹⁷⁹ and later the Court of Appeal in *R v BM*,⁹⁸⁰ the degree of consensual harm may be sufficient to cause grievous bodily harm and even death.⁹⁸¹ Thus, the assessment of the harm caused will determine the extent of the criminal law's intrusion within private matters concerning victimless crimes. This can be done by drawing an equitable line within the assessment of valid consent between permissible harm and impermissible harm.⁹⁸² The inquiry shall highlight minor consensual injuries that bring transient harm and serious consensual injuries that manifest in grievous bodily harm. Even if the physically harmful activities are consensual and private in their nature, the implementation of a criminal prosecution will be justified by the benchmark of this harm inquiry where grievous bodily harm or death occurs.⁹⁸³

⁹⁷⁸ *R v BM* [2018] EWCA Crim 560 at para 24.

⁹⁷⁹ *R v Brown* [1994] 1 AC 212.

⁹⁸⁰ *R v BM* [2018] EWCA Crim 560.

⁹⁸¹ *Ibid* at para 29.

⁹⁸² *Ibid* at para 30.

⁹⁸³ *Ibid*.

The case of *R v Wilson* involved the crime of assault with intention to do grievous bodily harm, yet the State refrained from implementing a prosecution as the consensual activity occurred between husband and wife and was likened to the accepted act of tattooing.⁹⁸⁴ It is submitted that it will be disjunctive if the criminal inquiry is solely based on the dynamic of the private matrimonial relationship.⁹⁸⁵ As explored in the case of *R v Brown*, the benchmark for a criminal prosecution regarding the commission of an assault from consensual bodily harm is the occurrence of actual/grievous bodily harm, or death. Even if the practice is branded as a victimless crime, which is hinged upon the consensual nature of the desired harm, a threshold of permissible exemptions must be interpreted in light of the nature and risk of the harm. Thus, grievous bodily harm will involve far more than a mere infliction of a wound and such shall bring the breakage of the skin or other forms of serious injury to the human body.⁹⁸⁶

The case of *Regina v Emmett*,⁹⁸⁷ however, diverts from the confines of the *Wilson* case and follows the considerations of the prohibited degrees of consensual harm expressed in *Brown*. Clearly, the equitable balance between consent to physical harm must be interpreted in light of the harm that transcends transiency and exists as actual, or grievous, bodily harm. In this consideration, consent as a defence to the infliction of the harm is rendered immaterial, as the nature of the harm, along with the compelling strides of the public interest, outweighs the individualistic desires of the participants. This, once again, is a reflection of a defined outline regarding the prohibited harm one may not legally consent to, as followed by the Court of Appeal in *R v BM*.⁹⁸⁸ This appears to be the suitable assessment of interpreting the nature of harm within consensual sadomasochistic encounters by removing any possibility of the judiciary's personal morality in influencing a judgement.⁹⁸⁹

The prosecution of assault that brought bodily harm in the case of *Emmett*, and the abstinence in effecting a prosecution in *Wilson*, casts a veil of confusion in relation to the criminal law's interpretation of consensual sadomasochism that brings bodily harm.⁹⁹⁰ The duality between these cases tests Article 14 of the ECHR that prohibits, *inter alia*, discrimination based on

⁹⁸⁴ *R v Wilson* (1996) 2 CR App Rep 241.

⁹⁸⁵ *R v BM* [2018] EWCA Crim 560 at para 33.

⁹⁸⁶ *Ibid* at para 37.

⁹⁸⁷ *Regina v Emmett* [1999] EWCA Crim 1710.

⁹⁸⁸ *R v BM* [2018] EWCA Crim 560.

⁹⁸⁹ The judgement of *R v Brown* [1994] 1 AC 212 has been scrutinised as being influenced by the personal moral views of the majority, rather than the equitable balance of the provisions of the criminal law.

⁹⁹⁰ It is important to note that both cases involved similar physical harm that manifested in the form of grievous, or actual, bodily harm.

sexuality.⁹⁹¹ This consideration is essential for compliance by the judiciaries of the relevant international spheres that interpret criminal cases involving consensual sadomasochism. In reflection of Article 14, it is submitted that a personal moralistic tenant should not influence the criminalisation of private consensual sadomasochism, but rather, such should be branded as criminal where grievous bodily harm, or death, is caused.

Thus, an equitable balancing of the criminal propensity of consensual sadomasochism, even if such occurs as a victimless crime, should be conducted in the assessment of the specific harm from the consensual relationship itself. Clearly, if consensual sadomasochism is practised in the public sphere, such may be sufficient to send shockwaves through the public, based on the intensity of the depicted harm. However, the intricacy of consensual sadomasochism arising in the private confines of adult interaction exists in isolation to the public knowledge. It is submitted that the practice of consensual sadomasochism within the private sphere mitigates the exposure of the harm by confining the risks to the participants alone. The definition of a victimless crime is apparent in this viewpoint, for the harm is restricted to only those who willingly partake in the consensual sadomasochistic activities.

The social convictions and moral beliefs of the community at large are only probed once the consensual private behaviour is exposed to the public. Under Article 8 of the ECHR, the respect for one's privacy is contained as a fundamental human right.⁹⁹² However, the Article does make mention that the State, or a public authority, may limit the right to privacy where such is necessary within a democratic society.⁹⁹³ This submission is paramount in conjunction with the degree of prohibited harm from consensual sadomasochism, as explored within the leading English cases. The investigation into the reasonable limitation of one's private life by the intrusion of the criminal law will account for the prevention of harm that may infringe, *inter alia*, the public safety, security, health, morals and the sanctity of human rights.⁹⁹⁴

The explored legal spheres of England and Canada within Chapter 2 of this dissertation proves that a culmination of legal factors must be considered when prosecuting consensual sadomasochism under the banner of the criminal law. The validity of personal autonomy of the consenting partners is not absolute, as the ECHR allows for the reasonable and justified

⁹⁹¹ Article 14 of Council of Europe "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950).

⁹⁹² Article 8 of Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

⁹⁹³ Article 8.2.

⁹⁹⁴ Ibid.

limitation of the extendibility of autonomy rights such as privacy.⁹⁹⁵ Therefore, freedom to consent to actual bodily harm that brings serious injury will be eclipsed by the combined values of the criminal law, the public interest, and public policy. This will inevitably nudge private consensual sadomasochism toward the definition of a victimless crime as such is justified, based on the nature of the harm and the potential risk of the practice itself. Where the practised harm is below the threshold of grievous bodily harm, private consensual sadomasochism may evade criminal prosecution. These submissions outline a clearer approach in the judiciary's interpretation regarding the nature of the harm practised within specific, private, and consensual sadomasochistic relationships. However, without a defined legislative guide to the validity and acceptance of the practice, the susceptibility of private consensual sadomasochism existing as a crime is highly probable in light of its inherent nature to cause assaults.

Thus, the exposure of the harm emanating from the consensual practice must be sufficient to cause potential risk and sufficient harm to the public safety. However, difficulty arises where consensual harm exists within the private realms of adult interaction, as the exposure of the harm is exclusive to those who consent to the injury. Surely, by application of the findings of the Wolfenden Report and by the submissions of the Hart-Devlin Debate, the private confines of adult interactions should not be limited by State intrusion where no harm exists outside the consensual interactions. By virtue of the precedent shaping landscape of the English and Canadian legal spheres, an equitable barrier of permissible harm to consensual injury should be determined by the relevant court in accordance with the harm inquiry created in *R v Brown* and the cases that followed.⁹⁹⁶ As mentioned earlier in this subchapter, if the consensual activity of the private encounter transcends the threshold of permissible harm, a limitation upon personal autonomy rights may be effected by the criminal law's sanctions.

It would be disproportionate if a blanket imposition of the crime of assault were applied to all variants of consensual sadomasochistic activities. Where the impact of the harm and infringement from the criminal sanction outweighs the harm that is practised within the consensual relationship, a prosecution should be avoided. This steers consensual sadomasochism away from the ambit of a crime where the harm is minor, or transient in its nature. The same cannot be said for consensual sadomasochism occurring in grievous bodily harm, or in greater intensities. This investigation should be assessed objectively in light of the

⁹⁹⁵ Article 8 of Council of Europe "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950).

⁹⁹⁶ *R v Brown* [1994] 1 AC 212.

values of the criminal law, the public interest, and the policy considerations of the relevant jurisdiction.

5.5.2 'S.S.C' and 'R.A.C.K': The Internal Controls of Consensual Sadomasochism

The 'kink' community is one with stringent rules and safety measures that have formed part of the bedrock of its internal society. If conducted in line with the internal controls of the community, negotiation and consent are essential within the ideology of safety in the sexual dynamic.⁹⁹⁷ There are two predominate avenues of control that are valued within a consensual sadomasochistic relationship. The first consideration is the practice of 'Safe, Sane and Consensual' interactions (herein referred to by the acronym S.S.C). Secondly, another consideration of control is the 'Risk Aware Consensual Kink' (herein referred to by the acronym R.A.C.K). Both of these concepts will be explored in relation to their influence within consensual kink relationships and their attempted mitigation to harm caused between participants.

'S.S.C' alludes to a general criterion of consensus that should be existent within consensual 'kink' relationships. Since sadomasochism falls within the bracket of 'consensual kink',⁹⁹⁸ stringent observations of safety derive heavily from the framework of S.S.C. In the hopes of deciphering the linguistic definitions of the acronym, the following submissions must be made:

- Safety can be defined as the absence of harm, or the risk of injury, within the consensual relationship.⁹⁹⁹
- Sane asserts the rational mental capacity of the participants that are able to perceive and appreciate the nature of the consensual activity.¹⁰⁰⁰
- Consensual is synonymous to a mutual agreement between the partners regarding the acceptance of all particulars, or foreseeable events, of the consensual activity.¹⁰⁰¹

⁹⁹⁷ K. Black "Safe sane and consensual: SSC vs R.A.C.K" *Keeping it Kinky* (20 September 2011), Retrieved from <http://www.keepingitkinky.net/BDSM/kink-basics/consent/ssc-vs-rack/>. (accessed on 11 September 2018).

⁹⁹⁸ D.J. Williams et al. 'From "SSC" and "Rack" to the "4cs": Introducing a New Framework for Negotiating BDSM Participation' (2014) 17 *Electronic Journal of Human Sexuality*, Retrieved from <http://www.ejhs.org/volume17/BDSM.html>.

⁹⁹⁹ "Rack vs SSC," *Within Reality*, Retrieved from <http://withinreality.com/wp/rack-vs-ssc/> (accessed on 11 September 2018).

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ Ibid.

The contents of 'S.S.C' propel a definitive and absolute standard within a consensual 'kink' relationship. To satisfy the objectives of the acronym, one must align both their physical conduct and mental bearing to the objective outline of 'S.S.C'. Clearly, the 'kink' community creates an objective test for the harm that may be incurred within the consensual 'kink' activity. This proposes that one is engaging in safe, sane and consensual kink activities, based on the alignment of their physical and mental bearings with criteria of the aforementioned definitions. Where one or more requirements from this framework are omitted, such may be deemed as conduct arising outside the desired scope of a safe, sane, and consensual 'kink' activity. The difficulty of considering all 'kink' activities under the framework of the 'S.S.C' is that such would limit the subjective diversity of differing 'kink' activities. Furthermore, a single, stringent safety and control framework does little to accommodate for the varying degrees of risk and harm that may be present in other consensual 'kink' relationships.

In minor, yet definitive contrast, R.A.C.K is applied to encourage a framework that is derived solely from the subjective dynamic of a specific 'kink' relationship. In a reflection of the respective roles between the partners, the onus of safety, sanity, and consensual 'kink' are placed upon the participants within the duality of their relationship. A focus of this framework is the bolstering of the internal assessment of harm that is subjectively desired between the consenting partners. R.A.C.K encompasses the following objectives for assessment:

- Risk and the possibility of personal injury created within the dynamic of the relationship must be established. This is noteworthy, for the element of 'safety' within the specific consensual activity is reflected in the light of a 'risk-awareness' approach between the partners.¹⁰⁰²
- Awareness is pivotal between the participants in the consensual 'kink' activity. Awareness may be compartmentalised within the knowledge of the risk that is present in the relationship and the reflection of the appreciation of the potential harm.
- Consent, once again, is vital for the negotiation between 'kink' partners. A mutual agreement must exist, reflecting the appreciation of all particulars, or foreseeable events, of the consensual activity.
- Kink, being the form of sexual expression, is the binding inspiration of sexual interaction between the partners.

¹⁰⁰² See the *Social Context for the Development of SSC and RACK* in "From "SSC" and "Rack" to the "4cs": Introducing a New Framework for Negotiating BDSM Participation." Op cit note 998 above.

R.A.C.K is a framework that endures in an awareness-driven approach. This is identifiable to the specific will of the participants who belong to a particular consensual kink relationship. The subjectivity of the assessment may be valid, only if the partners themselves show a holistic manifestation and appreciation of the acronym's criteria, applied to their sexual dynamic. Thus, a partner to the 'kink' must display personal awareness to the desired consensual harm, along with appreciating the risk of harm that exists within the relationship. If such an appreciation is absent, the validity of the relationship fails the awareness-driven test of R.A.C.K. This submission reflects the subjectivity of certain consensual 'kink' relationships and encourages the internal autonomy of the participants to shape the dynamic of 'kink',¹⁰⁰³ based on their informed decisions.¹⁰⁰⁴ R.A.C.K inevitably deviates from the prescribed descriptions of S.S.C, allowing for a newer and personalised consensual dynamic between partners.¹⁰⁰⁵

Thus, the freedom afforded by the guiding frameworks of the 'kink' community allows for a duality within consensual relationships. It is submitted that not all consensual kink relationships will involve the risk of harm, thus the S.S.C methodology may be applied. However, where risks are prevalent, the R.A.C.K measures entrench a personalised consensual rubric of assessment regarding the appreciation of the harm from such a risk. Ultimately, the consenting partners to the activity will choose which framework to follow, based on their autonomous desires.¹⁰⁰⁶ This supports the consensual nature of the 'kink' dynamic and caters for negotiations between the partners in optimising safety by controlling the risk of harm internally.

Consensual sadomasochism may prove to be more sexual in its nature, with violence or physical force as an accessory factor. The harm that is caused by consensual 'kink' relationships should also be interpreted in light of the internal framework chosen by the partners. This reflects the internal moralism of the consensual relationship and ignites the necessary safeguards for the rights of equality, privacy, dignity, and freedom of expression. However, the greater the harm and the more intricate the 'kink' relationship, the higher the degree of legal scrutiny and intrusion may be. The criminal law may give credence to the

¹⁰⁰³ See "Rack vs SSC".

¹⁰⁰⁴ Ibid.

¹⁰⁰⁵ J.W. Bean "The SSC Mistake," *Within Reality*, Retrieved from <http://withinreality.com/wp/ssc-mistake/>. (accessed on 11 September 2018).

¹⁰⁰⁶ Black "SSC vs R.A.C.K".

internal frameworks of the 'kink' community, yet will not fully consider these as absolute when juxtaposed to its own controls.

5.5.3 Possible Stance within South Africa

To avoid rewording that which has already been explored in this chapter, the South African outlook will be influenced by the values of the Constitution and the controls of the criminal law if interpreting consensual sadomasochism.¹⁰⁰⁷

In reflection of that which has been established from both English and Canadian perspectives of creating a threshold of permissible harm, the crime of assault will be probed in light of its variants within South African criminal law. Common assault, that brings transient and trifling harm should not call for a prosecution of private consensual sadomasochism, based on the nature of the harm and the autonomous actions of the partners. However, in following the approach of *R v Brown*, a defined threshold of declaring consent to an assault as immaterial must be established.¹⁰⁰⁸ It is submitted that this may exist in the definition of an assault with intention to do grievous bodily harm, as accounted for by the criminal law of South Africa, which causes actual bodily harm.

Assault with intention to do grievous bodily harm has progressed to reflect that such may constitute any harm that is capable of causing serious injury and sufficient to interfere with the health of a person.¹⁰⁰⁹ The intention element of this form of assault is potentially satisfied based on the agreement between the consenting partners to inflict harm. If a partner desires a severe degree of harm to be inflicted upon them, and the corresponding participant agrees, such may reflect a candid resonance of the satisfaction of the element of intention. Thus, if the South African criminal law were to draw the line of consent to sadomasochism at the commission of actual bodily harm from an assault with intention to do grievous bodily harm, consent to the harm will fail as a defence for an accused, based on the intensity of the inflicted harm. Therefore, it is submitted that consensual sadomasochism which does not bring grievous bodily harm may find exemption from prosecution if such a matter is heard before a South African court.

¹⁰⁰⁷ The Constitution of the Republic of South Africa.

¹⁰⁰⁸ *R v Brown* [1994] 1 AC 212.

¹⁰⁰⁹ Burchell *Principles of Criminal Law* (2013) 586.

However, even if the consensual harm occurs in a private setting, the South African criminal law may be justified in imposing a criminal sanction over actions that bring actual bodily harm in the pursuit of sexual gratification. This plunges certain consensual sadomasochistic activities into a victimless crime bracket; and in the dearth of legal literature to this sexual activity, the possibility of the victimless crime status is likely to endure. Clearly, if consensual sadomasochism were to be practised in the broad spectrum of the public, the exposure of the social harm of the practice increases. Perhaps the criminal law may adopt some leniency if addressing a matter that involves private consensual sadomasochism that occurs below the threshold of grievous bodily harm.

The Constitution tacitly combats victimless crimes under the Bill of Rights by entrenching the fundamental rights of personhood.¹⁰¹⁰ The right to equality caters for the prevention of discrimination by the State regarding, *inter alia*, sexual orientation.¹⁰¹¹ Further, the right to privacy may potentially safeguard the existence of specific forms of consensual sadomasochism occurring within the private areas of adult interactions.¹⁰¹² The difficulty of the criminal law in finding an avenue of criminalisation for private consensual activities may lie within the right to freedom expression.¹⁰¹³ However, sadomasochism is far more than a normative sexual activity, and in some instances, promises a degree of physical harm. The right to freedom of expression does not condone any form of imminent violence¹⁰¹⁴, and in turn, consensual sadomasochism that brings violence is seemingly divergent to this Constitutional provision.

These aforementioned rights are not absolute and may be limited under the Limitations Clause contained within the Bill of Rights.¹⁰¹⁵ The Constitution acts as the harbinger of validity for the consensual practice and its corresponding autonomy rights, however, such may not be absolute depending on the nature of the desired harm. This will be interpreted in light of the degree of the harm incurred and it is probable that where actual, or grievous, bodily harm arises, a criminal prosecution will likely follow. It is submitted that even if the practice is consensual in nature, the extent of the harm caused will determine the entry point for the criminal law. Albeit a potential victimless crime, the nature of the harm from consensual sadomasochism may prove

¹⁰¹⁰ Chapter 2 of the Constitution of the Republic of South Africa.

¹⁰¹¹ Section 9(3).

¹⁰¹² Section 14.

¹⁰¹³ Section 16.

¹⁰¹⁴ Section 16(2)(b).

¹⁰¹⁵ Section 36(1).

ancillary to the morals created by the Constitution and that which is commonly shared by the public interest, public morality, and public policy. Ultimately, a matter that involves consensual sadomasochism bringing bodily harm must be assessed in light of its own facts and merits.

The recent judgement of *YG v S* offers an interesting contemporary outlook on the South African criminal law's perspective relating to the disciplinary chastisement of children.¹⁰¹⁶ The principles of the judgement are noteworthy in relation to the interpretative outlook on disciplinary chastisement being declared as unlawful, based on the infringement such a practice brings upon the rights of a child. This may be compared to the possible position a South African court might have when determining the validity of consensual sadomasochism that brings degrees of bodily harm.

The judgment reflects the adaptive nature of the South African Criminal law in supporting the inherent Constitutional rights of the child, and even extending the crime of assault over the actions of a parent who implements this method of discipline. The importance of the judgement is that it also considers the defence of reasonableness – reasonable chastisement in the matter at hand – and the credibility of such a defence where bodily harm has been administered.

It was the consideration of the Keightley, J that the common law defence of reasonable chastisement is unconstitutional and invalid within the legal system of South Africa.¹⁰¹⁷ It was the opinion of the Court that the common law must be developed in order to emancipate the rights of the child in terms of the Constitution and the rights bestowed under the Children's Act.¹⁰¹⁸ It is evident that the stance of the Court in entrenching, *inter alia*, the Constitutional rights of the child transcended even the consideration of freedom of religious beliefs in the present case.¹⁰¹⁹ The Court was instrumental in interpreting the defence of *YG*, being that of reasonable chastisement, and eventually ruled in favour of upholding and protecting child-orientated rights within the South African legal system.

In determining what was reasonable, the Court noted the following:

“In determining what is reasonable or moderate, much will depend on the facts of each case. Our courts have indicated that regard must be had to factors such as:

¹⁰¹⁶ *YG v S* (A263/2016) [2017] ZAGPJHC 290; 2018 (1) SACR 64 (GJ) (19 October 2017).

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ *Ibid* at para 61.

¹⁰¹⁹ The accused father (*YG*) had pleaded that it was within the freedom of his religious convictions to apply corporal punishment as a form of discipline over his child, after he had found his son watching pornography. Accordingly, he raised the defence of reasonable chastisement of his child in the wake of his charge.

- 1.) the nature of the child's disciplinary infraction;
- 2.) the motive of the person administering the punishment;
- 3.) the degree of force applied;
- 4.) the object that was used to administer the punishment; and
- 5.) the age, sex and build of the child.¹⁰²⁰

Keightley, J stated the following:

“It is important that the State is empowered, rather than shackled, by the arsenal at its disposal to investigate, prevent and protect children from harmful and potentially harmful situations.”¹⁰²¹

Upon a critical analysis of the above-mentioned statement, it is evident that the State is equipped with an inventory of legal aids to protect and interpret the rights of children when faced with acts that would infringe such rights. This outlook may also give clarity to the position of a Court when interpreting consensual sexual violence that brings bodily harm, and may progress such beyond the notion of a victimless crime. Just as children's rights are protected, so too may the submissive's rights be safeguarded where consensual bodily harm has been administered. The consideration of reasonableness as a defence with regard to consensual sadomasochism that brings bodily harm may rightly follow the considerations of the Court in *YG*. It must be stressed that there is no defence of reasonable sadomasochism within South African law, and so the defence of 'reasonableness' to the harm caused will be shaped upon a case-by-case basis and within its contextual definition. This will aid the relevant Court in determining whether the harm administered transcends the ambit of reasonableness to the specific consensual relationship.

In order to determine a defence of reasonable harm to consensual sadomasochism, the following should be considered:

Firstly, it would be appropriate for a South African court to assess such a defence upon the degree of harm which is administered by a dominant upon the submissive. As explored in Chapter 2 of this thesis, the commission of serious, or grievous bodily harm is the probable

¹⁰²⁰ *YG v S* (A263/2016) [2017] ZAGPJHC 290; 2018 (1) SACR 64 (GJ) (19 October 2017) at para 34.

¹⁰²¹ *Ibid* at para 79.

entry point for prosecution of consensual sadomasochism. Where said harm is caused, it is likely that the defence of reasonableness will hold little merit for an accused.¹⁰²²

Secondly, where items or objects are used to inflict the consensual harm, such may override the concept of reasonableness with regard to the given practice, as the force of the intended harm is heightened. A Court will also consider the motive of the person administering the bodily harm or punishment.¹⁰²³ Importantly here, consensual sadomasochism lacks a societal conviction and the motive for inflicting the violence is for the sexual benefit of the consenting partners.¹⁰²⁴ This would prove to discredit the defence of reasonableness for the commissioning of bodily harm in the practice of consensual sadomasochism if found before a South African court.

Thirdly, and in consideration of the force and nature of the harm caused, a court would be alive to the infraction of the rights of the submissive within a consensual sadomasochistic relationship. A defence of reasonableness in this stead would be hinged against the State's obligation of safeguarding the rights to bodily safety and security, along with the protection of the submissive's inherent dignity.¹⁰²⁵ Where a court views that the consensual harm is too severe, the actions of the accused would translate to the crime of assault.¹⁰²⁶

The considerations of the case of *YG* extend to the clarity of consensual sadomasochism and the practice being considered a crime if the harm caused between the partners extends into serious, or grievous, bodily harm. Additionally, such may find prosecution where the consensual harm is inflicted in great force and disregards the rights safety and dignity of the submissive. The onus of proving said infringements must be borne by the State and it is imperative that such an investigation is conducted in relation to the specific consensual relationship.

5.6 Conclusion

Victimless crimes appear to be existent in continuous judicial debates across the legal jurisdictions of the world; yet, positive steps have been taken to rid a legal system of such

¹⁰²² Ibid at para 70.

¹⁰²³ Ibid at para 34.

¹⁰²⁴ As was explored in Chapter 3 of this dissertation.

¹⁰²⁵ *YG v S* (A263/2016) [2017] ZAGPJHC 290; 2018 (1) SACR 64 (GJ) (19 October 2017) at paras 40 and 72.

¹⁰²⁶ Ibid at para 74.

anomalies. Moralism may once have existed as a battering-ram for the criminal prosecution of victimless crimes, however, such appears to be dwindling in the contemporary legal spheres of the world. It has been explored that the application of the law itself should serve as the final arbiter regarding a practice that is considered 'morally divergent' and a holistic balancing of the interests of the accused and the State must take flight. If the harm practised by a consensual and private activity outweighs the protected rights of the State, a valid classification of a victimless crime shall occur. It is likely that if consensual sadomasochism is found before a South African court, a prosecution is likely to occur where the harm practiced falls within the definition of actual, or grievous, bodily harm.

The act of consensual sadomasochism may fall within criminality and face prosecution where the State can prove that the actions of an accused has brought serious, or grievous, bodily harm that has infringed the rights of safety and dignity of a person. If an accused were to raise the defence of reasonableness in regard to the inflicted harm, such will be assessed in light of the nature of the harm caused, along with the force applied and the motive in administering such violence. This, in turn, may bring consensual sadomasochism out of the victimless crime consideration and apply definitive criminal sanction over said activities.

CHAPTER 6: AMALGAMATION OF THE ARGUMENTS, RECOMMENDATIONS AND FINAL REMARKS

6.1 Summary of the Research Findings

The case of *R v Brown* and its retinue of developing matters from both England and Canada may undoubtedly influence the possible stance of the South African Criminal law regarding the legality of consensual sadomasochism.¹⁰²⁷ Where consensual sexual violence arises in varying degrees of bodily harm, it is likely that the criminal law will launch a multi-faceted investigation into the harm caused. This will also give credence to the specific Constitutional rights of the participants. The debate surrounding the validity of consensual sadomasochism may borrow a judicial perspective from the positions of England and Canada in sculpting a guiding rubric for the South African legal sphere. However, without specific legislation that outlines the validity of the varying degrees of harm emanating from consensual sexual violence, the existing legislation and common law positions of South Africa are the probable avenue of accessibility for a court to determine such matters. The inquiry of a court will be hinged upon the nature of the consensual relationship and the degree of the harm caused by the partners.

The premise of this dissertation intended to determine the response of the criminal law to private displays of consensual sadomasochism, as it is within this network where the greatest infringements of personality rights arise by both the actions of the participants and the possible intervention by the State. It was not the intention of this dissertation to determine whether consensual sadomasochism may be classified as predominantly violent, or a form of sexual expression. Merely, this dissertation sought to interpret the relevant case law and supporting pieces of legal literature to draw a predictive outline of the South African law's approach if a similar matter arises within its jurisdiction. Further, consensual sadomasochism practised in the public sphere was not the focus of the dissertation, for a prosecution of the practice is highly likely in this medium, based on the widespread exposure of the harm to the public. The legal validity of consensual sexual violence within the private confines of adult interaction is a far

¹⁰²⁷ *R v Brown* [1994] 1 AC 212.

more intricate web to decipher, yet the dissertation has considered multiple areas of inquiry that potentially outline the direction of a South African court if faced with such a matter.

Thus, it is suggested that just as the criminal law interprets dangerous consensual activities that bring variant degrees of bodily harm, it should also adopt a similar approach when dealing with private consensual sadomasochism. Within the early investigation of valid consent to bodily harm, the applicability of the common law doctrine known as the *volenti non fit iniuria* takes flight. Even though such has greater application in the law of delict, the criminal law may rightly borrow from this doctrine in the assessment of consent. This draws inspiration from the submissions of chapter two of this dissertation regarding consent to bodily harm – echoing the element of intention to cause and receive specific bodily harm. The *volenti non fit iniuria* doctrine may be applied in light of consensual sadomasochism arising in serious bodily harm in the South African legal system. This will reflect the voluntary acceptance of the risk of a partner to the consensual harm and the waiving of their right to claim damages, or effect a prosecution, against the harm-bringer if the outlined harm arises.¹⁰²⁸ However, the intensity of the harm that is practised greatly moulds the application of the doctrine and it may not always exist as the clear-cut colloquialism of ‘he who consents cannot be injured.’¹⁰²⁹

Chapter two found limitation in the exploration of the South African perspective on varying degrees of consent to bodily harm. The jurisdictions of England and Canada drew the line of invalidity of consent at the occasioning of actual bodily harm practised in consensual sadomasochism. The criminal law of South Africa highlights two forms of assault, namely common assault and assault with intention to do grievous bodily harm. In the hopes of following the guidelines of the international precedents, a South African court may draw an equitable line regarding the invalidity of consent to sadomasochism where grievous bodily harm arises, even if the element of consent is present.¹⁰³⁰

Therefore, the objective of chapter two was to illustrate a coherent balance between the extent of valid consent to bodily injury and the entanglement of consensual sadomasochism in this inquiry. It was explored that this investigation will be determined by the nature of the harm caused within the consensual relationship and that valid informed consent is not an absolute defence to avoid criminal liability where grievous bodily harm arises. Evidently, chapter two

¹⁰²⁸ See *Plumridge v Road Accident Fund* (2656/2009) [2012] ZACEPEHC 48 (7 August 2012) at para 11.

¹⁰²⁹ See *Roux v Hattingh* (636/11) [2012] ZASCA132 (27 September 2012) at para 41.

¹⁰³⁰ See *S v Ngubeni* (A459/2008) [2008] ZAGPHC 178 (17 June 2008) at para 25.

highlights the *volenti non fit iniuria* doctrine's correlation with public policy and various protected autonomy rights of the consenting sadomasochists.

Under chapter three, public policy prerogatives of England, Canada, and South Africa were respectively probed in juxtaposition to harm caused by consensual sadomasochism. This inquiry, feeding off the thread from chapter two, considered a contemporary outlook of public policy and its toleration of consensual harm that brings varying degrees of bodily injury. Specifically, the chapter drew inspiration from the developments of the law reform commissions of the England and Canada, which focussed on the prevention of harm unto the members of the public. The consideration of the 'Social Utility' principle, regarding the validity of a consensual sadomasochistic practice,¹⁰³¹ was disputed as being inadequate to stand as the sole reason to criminalise such conduct.¹⁰³² The Law Reform Commission of the England notably attempted to shed a clear resurgence of public policy and its interpretation of the variant harms caused within private consensual sadomasochism. In terms of its more notable submissions, the Commission proposed that the policy considerations would not allow the validity of consent to excuse criminal liability where seriously disabling injury is practised.¹⁰³³ This exists as a paramount contemporary position, as it is aimed at the prevention of widespread harm unto members of the public and to control the practices of private consensual sadomasochism that brings such serious harm.¹⁰³⁴ Further, the chapter outlined the growing social prominence of sadomasochistic material that exists within the accessibility of the contemporary public spheres of the world.

The aim of chapter three was to show the possible outline of South Africa's public policy considerations to consensual sadomasochism, bringing varying degrees of bodily harm and broader social infringement. The content of the chapter projected the legal aids that inhabit the considerations of public policy, influenced by the Constitution, as well as the *boni mores* criterion and Ubuntu. These factors mould and guide the possible South African policy considerations regarding consensual harm emanating from sadomasochism and the permissible degrees such harm may include. The chapter, by the implementation of the aforementioned legal aids, arrived at a candid reflection of the duty of care for the autonomy rights of the

¹⁰³¹ Bielefeld 'The culture of consent and traditional punishments under customary law' (2003) 145.

¹⁰³² See *R v Jobidon* 1991 2 SCR 714.

¹⁰³³ See para. 10.52 of "Consent in the Criminal Law: A Consultation Paper, No. 139," 146.

¹⁰³⁴ Ibid see para. 2.18 (7), 20.

consenting sadomasochists when facing a possible criminal prosecution by the State.¹⁰³⁵ Yet, the converse exposed that a criminalisation of consensual sadomasochism may be effected where the practice is sufficiently probable in causing widespread harm unto the public.

Chapter four resumed the ignited debate of the sanctity of the autonomy rights of the consenting sadomasochists and sought valued direction from the precursor international conventions for human rights.¹⁰³⁶ The chapter explored the progressive jurisprudential amalgamations of the concept of autonomy and narrowed the investigation into three paramount rights, as contained within the South African Constitution. The right to privacy¹⁰³⁷ echoes the chapter's drive to safeguard the private dwelling of the autonomous actions of the consenting sadomasochists.¹⁰³⁸ It appears that if the State infringes the right to privacy, a collection of other autonomy rights will also fall into limitation. The chapter further sought to reflect the right to freedom of expression within consensual sadomasochistic relationships and its internal controls and limitations, as accounted for by the South African Constitution.¹⁰³⁹ The right to human dignity brings the most difficulty in terms of jurisprudential clarity, based on its subjective-objective construct.¹⁰⁴⁰ This, however, appears to strengthen the argument for the safeguarding of the practice of consensual sadomasochism, even in the commission of grievous bodily harm, if the harm is truly desired by the injured party as part of their dignity. Therefore, the right to human dignity and its creation of an intrinsic bulwark for each individual serves as a potential repellent to the criminal prosecution of consensual sadomasochism.

The broad consideration of chapter four illustrated the conglomerate of human rights linked to the practice of consensual sadomasochism within a collaborative nature. It is within human dignity that the rights to privacy and freedom of expression may grow, however, section 36(1) of the Constitution limits the absoluteness of these rights under a defined and stringent framework.¹⁰⁴¹ The chapter arrived at the conclusion that where an appropriate South African court is faced with consensual sadomasochism bringing grievous bodily harm and injury, it may rightly limit the autonomy rights that give rise to such harm; namely the rights to privacy,

¹⁰³⁵ See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

¹⁰³⁶ See UN General Assembly "Universal Declaration of Human Rights" (1948) and Council of Europe "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950).

¹⁰³⁷ Section 14 of the Constitution of the Republic of South Africa.

¹⁰³⁸ *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB).

¹⁰³⁹ Section 16 of the Constitution of the Republic of South Africa.

¹⁰⁴⁰ Section 10.

¹⁰⁴¹ Section 36(1).

human dignity, and freedom of expression. Here, the appropriate balance between the protected constitutional rights of the participating sadomasochists and the compelling interests of the State may be achieved by the potential limitation of the autonomy rights under section 36(1),¹⁰⁴² based on the severity of the harm caused. This, however, as explored within the confines of chapter four, is dependent upon a case-by-case basis and the individual facts presented before the appropriate court.

Chapter five of the dissertation interpreted the probability of consensual sadomasochism enduring as a victimless crime within the South African legal sphere. This penultimate chapter showed the detachment of the appropriate international criminal spheres from the influence of public morality in shaping a criminal prosecution. Clearly, the South African Constitution propels a broad collective moralism by entrenching such values across numerous internal provisions, whilst tacitly influencing other pieces of legal literature to adopt a similar stance. However, it is likely that the common morality of the broader public may not influence the dispensation of the criminal law, as such is likely to derive itself from its statutory virtues. Therefore, moral pluralism is an important consideration for an appropriate court to consider if interpreting the harm from private consensual sadomasochism and the moral tolerance of the practice itself.

In the absence of any defined statutory or common law definition of consensual sadomasochism bringing varying degrees of bodily harm, it is likely that a South African court will juxtapose such to either common assault, or assault with intention to do grievous bodily harm. Ultimately, private consensual sadomasochism causing transient and trifling harm may suffer no criminal sanction, and thus, may evade the definition of a victimless crime and the implementation of a prosecution. The penultimate chapter asserted that where the private consensual activities bring grievous, or serious, bodily harm, it is necessary for the criminal law to effect a prosecution, based on the consensual practice exceeding the desired legal threshold of valid consent to bodily harm.¹⁰⁴³ A defence of reasonableness to the harm caused by an accused will likely fall away where the nature of the harm was serious, or grievous in its nature and has infringed the Constitutionally protected rights of a person.¹⁰⁴⁴

¹⁰⁴² Ibid.

¹⁰⁴³ See *R v BM* [2018] EWCA Crim 560.

¹⁰⁴⁴ See *YG v S* (A263/2016) [2017] ZAGPJHC 290; 2018 (1) SACR 64 (GJ) (19 October 2017).

6.2 Recommendations

6.2.1 Introduction

The dearth of legal literature surrounding the South African Criminal law's interpretation of consensual sadomasochism does not leave this practice in a legal void. The case of *R v Brown* and the contemporary case of *R v Lock*, prove that the growing developments of judicial and jurisprudential interpretation of the issue are never static. The case of *R v Brown* showed the initial stance of the English Criminal law to consensual sadomasochism and the application of the laws of assault to effect an immediate criminal prosecution. Further, the case outlined a desired level of harm that may be practised within consensual sadomasochism that is permitted by the current criminal law positions. Moreover, the case sought to establish a defined social usage of the practice to permit the validity of consent to actual bodily harm.

The weakness of this approach, and its inherent problem within the contemporary South African legal sphere, is that it ushers a blanket disregard to the autonomy rights of the consenting partners. Further, the approach in *Brown* is problematic within a contemporary legal sphere, based on the ever-evolving public policy considerations relating to the acceptance of certain consensual sadomasochistic activities. The case of *Lock* reiterates that a court should consider a matter of consensual sadomasochism that brings actual, or in grievous, bodily harm upon its own facts and merits. It is probable that a South African court may adopt a similar approach as the aforementioned matter where consensual bodily harm is practiced. Through the establishment and unravelling of supporting legal literature, the dissertation also advocated for the credence of the expansion of public policy and its population of consensual sexual activities that bring various degrees of desired bodily harm.

Without a defined legislative outline, a court may consider the likeness of consensual sadomasochism bringing actual, or grievous, bodily harm in light of a role-playing game. This option proposes that consensual sadomasochism might be interpreted in the same avenues as the rules of a lawful sport and within a reflective internal appeal that is in line with the values of the 'kink' community. Further, the collection of exploratory research from the cross-jurisdictional timeline of England and Canada proposes the development of the criminal law in safeguarding the personal autonomy rights of the consenting partners in the harm-causing relationship. Even if the judiciaries of England and Canada, along with the submissions of their

respective law commissions, do not list consensual sadomasochism as an exception to prosecution, the legality of the practice may still evade criminality based on the extent of harm practiced within the specific consensual relationship.

6.2.1 Proposed Recommendations for a South African Court's Inquiry

Without any defined legislative authority governing the practice of consensual sadomasochism, the relevant South African court may consult the existing resources of the criminal law to effect an adequate response to the occasioning of serious, or grievous bodily harm. However, a court must be alive to the considerations of the nature of the consensual practice, along with the recognition of the constitutional rights that protect the participants in their private and autonomous actions. Even though some consensual activities may bring grievous bodily harm, the relevant court should consider the practice upon its own merits and in light of the internal controls that are shared between the partners in inspiration of the standards of the 'kink' community. The following recommendations serve as a potential guiding rubric for a court in South Africa if deciphering consensual sexual violence. These recommendations and submissions, *inter alia*, attempt to guide a balanced and contemporary approach for a South African court's interpretation of the desired consensual harm that is practised and the interests of the State in safeguarding the public from receiving such harm.

i) Informed Consent

Informed consent is essential between the consenting partners to the sexual activity which brings bodily harm. In matters concerning the commission of varying degrees of bodily harm from consensual sadomasochism, the dominant should provide all particulars of the specific outcome and the true nature of the potential harm from the desired practice. The submissive, in turn, should express informed consent in their appreciation to partake in the harmful activities by accepting the reasonable risk of the potential injury. A submissive may only be considered to have given informed consent when they are aware of all material elements of the specific consensual activity. Therefore, the injured submissive that has received actual,

serious, or grievous, bodily harm must show a holistic appreciation of information regarding the specific harm of the practice from the dominant. It is recommended that informed consent must be observed between the dominant and submissive for the consensual practice to receive a potential exemption from a criminal sanction.

ii) Capacity

An adult participant must possess the necessary mental competency to partake in consensual sadomasochism. The dissertation has shown that adults who partake in consensual sexual violence must be imbued with the requisite mental capacity to express legally recognised consent to the appreciation of the potential risks of the practice. As recommended earlier, such a capacity must exhibit informed consent to willingly partake in the consensual sexual violence and a court may be best suited in testing this by reviewing the nature of consent between the partners. It would be appropriate for a court to consider the submissions of the DSM-V in assessing that those who partake in consensual sadomasochism are not mentally impaired.¹⁰⁴⁵

iii) Discrediting the Advanced Consent of an Injured Submissive

Some consensual sadomasochistic activities may render the submissive unconscious. In this regard, it is recommended that advanced consent given by a submissive will not be a defence to certain physically harmful activities inflicted upon their body whilst they dwell in a state of unconsciousness. For consent to serious, or grievous, bodily harm to be considered as valid by a South African court, the injured submissive must be aware of the specific harm at the time of its infliction.

iv) Minority Protection in the Facilitation for Freedom of Sexual Expression

Those who partake in consensual sadomasochism may be considered as a minority sexual group. The duty of care upon the State to safeguard the freedom of sexual expression between the consenting adults correlates to the protection of sexuality rights.

¹⁰⁴⁵ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 5 ed. (2013).

It is probable that the members of the 'kink' community might find solitude in the enjoyment of their private acts of sexual expression if the State takes proactive measures in the safeguarding of the right itself.

This may be achieved by the recognition of an accused's sexuality rights if an inquiry is made by a court. However, such rights may be limited where the enjoyment of said rights infringes other Constitutional rights and the notions of public health and safety within the notions of public policy.

Therefore, it is necessary for the State to tread carefully when attempting to limit the right to sexual expression when implementing a criminal prosecution against consensual sadomasochism which brings bodily harm.

v) The Flight of Subjective Human Dignity

Amongst the myriad of jurisprudential strides regarding human dignity, it is important for the State to acknowledge the subjective aspect of human dignity that is intrinsic to the specific consensual relationship. This will allow for the blossoming of the right to human dignity in the autonomous actions of the partners, as inspired by the concept of Ubuntu. Further, the subjectivity of the internal human dignity shared by the partners may be drawn from each consensual sadomasochistic inquiry involving variant degrees of bodily harm. Perhaps the State may mitigate a criminal prosecution against serious, or grievous, bodily harm emanating from the consensual practice if it were to consider consensual sadomasochism as forming part of the fundamental human dignity of the participants.

vi) The Permissibility of Privacy in Consensual Sadomasochism

The private sphere may not be arbitrarily infringed by the involvement of the criminal law to contain the potential widespread harm, permeating from the consensual relationship. Perhaps an inquiry into the private realm of consensual adult interactions may only be effected if the interests of the State, its criminal law and its policy considerations outweigh the interests of the participants.

vii) The Limiting of Autonomy Rights

It is recommended that section 36(1) of the Constitution be applied if a court is able to prove that the limitations of the autonomy rights are reasonable and justifiable within an open and democratic society. An objective inquiry must be considered by

a court in this stead, whilst holistically reflecting the concord of the specific consensual sadomasochistic relationship.

viii) Public Interest and Influence: Sexual Gratification in the Contemporary Policy Considerations

Even though sexual gratification has not yet formed an exemption to the inflicted degrees of consensual bodily harm, it is prudent for a court to consider the development of the practice of sadomasochism. The cases explored in chapter two of the dissertation may influence a South African court to interpret the consensual practice as a private sexual act, rather than an immediate demonstration of assault. However, even if instances dictate that an individual should not be the recipient of a criminal prosecution; the activity itself is not rendered lawful based on this consideration. It is likely that where grievous bodily harm is practiced, the influence of the public interest would nudge a court toward implementing a prosecution against an accused.

ix) Internal Controls of the Kink Community

It is recommended that a court consider the values of Safe, Sane and Consensual practices, along with the reflection of a Risk Aware Consensual Kink relationship if deal with consensual sadomasochism bringing bodily harm. This creates objective criteria for a court to assess the severity of the consented harm in light of the standards of the kink community, whilst also allowing for the subjective assessment of the internal dynamic of the sexual activity. This allows for the internal rules of the kink community to flourish as a consideration of the court in giving credence to the validity of the consensual practice. The existence and use of a safe word during the consensual practice may also prove vital for the inquiry of a court, as such reflects the internal controls utilised by the partners themselves and the voluntary rescindment of consent to the sexual activity.

It must be noted that these internal rules of the minority community may not necessarily rescue consensual sadomasochism which brings grievous bodily harm from State prosecution. It may, however, act as a mediator between the purport of the criminal law and the interpretation of the facts of the matter. The unregulated code of the kink community serves predominantly as a substantive interpreter of the

specific relationship that has brought consensual bodily harm and may aid the inquiry of a criminal court if assessing a similar matter.

x) Promotion of Public Health and Morality

The quintessential aspects of the criminal law's safeguards, as well as the policy considerations of South Africa, relate to the prevention of harm from befalling members of the public. It is probable that a court may attempt to safeguard the bodily safety, security and integrity of the injured submissive; as inspired by section 12 of the Constitution in implementing a criminal sanction. However, a broad social morality should not influence the dispensation of the criminal law and it is recommended that Constitutional morality should endure as the bedrock of the concept.

Where the severity of the inflicted harm arises in the form of serious, or grievous, bodily harm, it is likely that the State will favour the safeguarding of public health and morality and will inflict a criminal prosecution over the consensual conduct. It is unlikely that the subjective rights of the consenting adult partners will triumph over the Constitutional imperatives owed to the public as a whole where the above-mentioned form of bodily harm is practiced.

xi) Reasonableness and Degrees of Permitted Private Harm

Transient and trifling consensual injuries should not call for a criminal sanction. However, where the harm incurred results in actual, or grievous, bodily harm, it is recommended that the State should effect some element of paternalism and limit the personal autonomy of the participants.

It is vital that a defined manner of permitted harm be established by the findings of a court, based on the merits of the matter itself. A defined and permitted rubric of consensual private harm shall avoid the unanimous collection of all consensual sadomasochistic cases suffering from the brand of a victimless crime. It is probable that by the close of such a criminal inquiry, the prohibited ground of consensual harm in the form of sadomasochism is likely to be the commission of serious, or grievous, bodily harm. Thus, permissible harm is any other harm that is not serious, or grievous, or harm that brings death.

Additionally, the defence of reasonableness with regard to the inflicted consensual harm is unlikely to hold any merit for an accused where serious or grievous bodily harm is practiced. This is indicative of the Constitutional values, namely the safety to bodily integrity and prevention of bodily harm, a court is likely to follow and uphold when protecting the rights of the injured partner.

It is unlikely for the State to set the benchmark for intervention at transient and trifling consensual harm that falls outside of the definition of serious, or grievous, harm. Therefore, where the latter of the harm arises as a result of consensual sadomasochism, it is likely that such shall be met with State prosecution. This illustrates the seriousness of the injury and that consent, nor reasonableness of the specific harm, are insufficient in establishing a defence to the consensual harm.

xii) Consideration of the Impact from Media Influences

The now-famous literary piece known as '*Fifty Shades of Grey*' is but a mere granule within the developing avalanche of sadomasochistic material within the public sphere. It is recommended that a court should consider these contemporary influences as a noteworthy facet in the potential criminal inquiry. Additionally, a court should be alive to the consideration of the exposure such material might have in influencing the private interactions of consenting adults. It is further submitted that this may directly induce the actions of consenting partners to mimic and recreate such depictions, as seen in *R v Lock*, in private interactions and propel the spread of consensual sadomasochism. Judicial deliberation in this stead should interpret the matter upon its own facts and merits and consult the influence of the sadomasochistic material in relation to the bodily harm caused.

xiii) Creation of Guidelines for Consensual Harm

From a predictive outlook, any tearing of the skin releasing blood, the breakage of bones, or death of the consenting partner will transcend the desired South African policy considerations of permissible harm between consenting adults. The infliction of grievous bodily harm as a result of consensual sadomasochism is probable to endure as the benchmark for a criminal prosecution to be administered by the State.

It is recommended that this form of serious physical infliction within the private sphere of adult interaction be cautioned against by positive action on part of the

State. Ultimately, the positive action on part of the State is likely to be a criminal prosecution where said harm arises. Without a specific statutory definition of consensual sadomasochism bringing serious, or grievous, bodily harm, perhaps the State may attain the greatest guidance under the eventual direction of the South African Law Reform Commission. It is recommended that if a matter of consensual sadomasochism finds itself before a South African court, an investigation by the South African Law Reform Commission would be most beneficial for the development of, *inter alia*, the criminal law's position relating to such a consensual practice.

The reach of the Law Reform Commission's investigation and research will undoubtedly spur valid legal recommendations as to the permissible degrees of bodily harm that may be inflicted within such practices. The possible findings, suggestions, and recommendations of the South African Law Reform Commission may ease the validity of the practice's transition into broader legal acceptance, whilst also outlining prohibited forms of physical harm. In turn, these submissions will be proposed to Parliament and the relevant provincial legislatures, giving rise to potential future legislation dealing specifically with consensual sexual violence and its variant internal practices.

6.3 Final Remarks

The overall intention for the study of this research dissertation was to determine the probable stance of the South African criminal law in interpreting private and consensual sadomasochism that brings varying degrees of bodily harm. Based on the findings from relevant foreign and national sources of legislation, case law and policy considerations, it is probable that consensual sadomasochism bringing transient and trifling harm will not be subject to immediate criminal sanction. However, it is fathomable that an injury that brings serious, or grievous, bodily harm will be subject to the inquiry of the criminal law, even if committed within the private confines of consensual adult interactions. If arising within the South African legal sphere, consensual sadomasochism must be the recipient of a broad legal interpretation to determine its validity. This is attributed to the personality rights that are intrinsic to the

consenting partners and their possible limitations by application of the Constitution, the doctrine of public policy and the current criminal law.

The issue of consensual sadomasochism is one that is unique within South African jurisprudence. The reach of informed consent to physical injury, tied to the values of personal autonomy of the consensual practice, is entwined within the viewpoints of the current policy considerations of South Africa. This issue will inevitably simmer in the boiling pot that would be the eventual judicial review of the consensual practice that brings serious bodily harm. Reflectively viewed, the stance of the South African law to consensual sadomasochism, bringing varying degrees of bodily harm, is a pressing incentive for exploration, as shown by the growing sexual content and influences within the contemporary society.

The English case of *R v Brown* notably established the position of the relevant international jurisdictions where matters arising in consensual sadomasochism were brought into legal scrutiny. However, the antediluvian methods and approaches of *R v Brown*, which proposed, *inter alia*, State-control over private and autonomous adult interactions, prove unfounded within the current South African legal system. It is probable that if a South African court hears a matter of consensual sadomasochism, it would likely follow the contemporary guise set out in *R v Lock* by interpreting the facts of each case on their own merits regarding the practiced consensual harm. This approach, *inter alia*, will give credence to the personal autonomy of the participants, the safeguarding of relevant personality rights of the participants and the current policy considerations related to the matter itself.

It would have been impractical for the research to delve into consensual sadomasochism practised within the public sphere, for the exposure of the harm and the risk of injury are no longer restricted to the private realm. Perhaps the impact of widespread exposure to consensual sadomasochism within the public sphere is a debate for another academic piece. Ultimately, if this research were to be conducted, such may draw significantly on the preventative controls of the criminal law and the greater criminalisation of the practice itself.

The Constitutional rights of the participants served as the dissertation's contrasting argument for the protection of their specific personality rights; namely human dignity, privacy and freedom of expression. The probability of consensual sadomasochism falling within the bracket of a victimless crime rests upon the duality of the nature of the specific practice and the manner in which it occurs. Ultimately, the revelation of the research dissertation showed that where

serious, or grievous, bodily harm is inflicted in private settings, a prosecution of the consensual practice must be effected.

It is submitted that a core moralistic creed regarding the legal validity of the practice may only be derived from the Constitutional prerogatives and not the viewpoints of the broader public morality, nor the internal opinions of the minority groups that practice sadomasochism. When interpreting private consensual sadomasochism bringing serious, or grievous bodily harm, the relevant South African court may rightly limit the rights to freedom of expression and privacy. However, in consideration of these final thoughts for the dissertation, the subjective value of human dignity, which may be associated in the effecting of the consensual practice, must be acknowledged and protected within the State's potential inquisition. The positive duty of care owed by the South African law in propelling human rights, public health, and societal safety is etched across the broad canvases of numerous pieces of legal literature. It should be the consideration of a South African court to observe the aforementioned safeguards, especially in the protection of minority sexual groups and their individual autonomy in the enjoyment of their Constitutional rights.

The possible textual aids for a court's interpretation of consensual sadomasochism may be borne from the development of the specific crime of assault, along with any supporting legislative guides of applicability regarding the issue.¹⁰⁴⁶ However, a potential proposal from the South African Law Reform Commission shall provide the necessary research, interpretation, and definition of the Constitutional validity of consensual sexual violence in a holistic sense. This shall be beneficial for the overall balancing of the interests of the South African State, its public policy considerations and its criminal laws, as weighted against the autonomous interests of the participants to the consensual practices. The South African legal system should not shy away from such future developments and legal intrigue, as it is within the core of the country's democracy to be *'strong in will; to strive, to seek to find and not to yield'* in the presence of any legal anomalies.¹⁰⁴⁷

¹⁰⁴⁶ Section 173 of the Constitution of the Republic of South Africa.

¹⁰⁴⁷ K.F. Shoily "Myth and Meaning in Ulysses: Homer, Tennyson and Joyce" (Masters thesis, Brac University, 2013) 19.

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- Section 8

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